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PROCEEDINGS AND ORDERS

DATE: 040285

CASE NBR 83-1-01896 CFX
SHORT TITLE Mobil Oil Corp.
VERSUS Blanton, Jerry A., et al.

DOCKETED: May 18 1984

Date	Proceedings and Orders
May 18 1984	Petition for writ of certiorari filed.
Jun 25 1984	Brief of respondents Jerry A. Blanton, et al. in opposition filed.
Jun 27 1984	DISTRIBUTED. September 24, 1984
Jul 18 1984	Reply brief of petitioner Mobil Oil Corp. filed.
Oct 1 1984	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Feb 15 1985	Brief amicus curiae of United States filed.
Feb 20 1985	REDISTRIBUTED. March 15, 1985
Mar 7 1985	Supplemental brief of petitioner Mobil Oil Corp.and response to U.S. amicus curiae brief filed.
Mar 18 1985	REDISTRIBUTED. March 22, 1985
Mar 25 1985	REDISTRIBUTED. March 29, 1985
Apr 1 1985	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

CONTINUE {

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,

vs.

JERRY A. BLANTON, ROY H. HEALEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether judgment of trebled damages for attempting to monopolize a market which cannot constitute a relevant market under the federal U.S. antitrust laws may be sustained solely on the basis of a Ninth Circuit rule which interprets Section 2 of the Sherman Act in a manner conflicting with decisions of this Court and the law in every other circuit.

2. Whether liability for attempted monopoly may be imposed without any showing of dangerous probability of successful monopolization of a relevant market and thus, without any showing that a defendant's conduct had a detrimental impact on competition, thereby transforming Sherman Act Section 2 into a statute generally regulating all manner of business practices without regard to their impact on competition.

3. Whether certiorari should be granted to resolve the conflict between all other Courts of Appeal and the anomalous Ninth Circuit rule, which is the subject of great confusion even among different panels of the Ninth Circuit, and which has resulted in extensive and unnecessary litigation in that Circuit.

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No.

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OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,

vs.

JERRY A. BLANTON, ROY H. HEALEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Mobil Oil Corporation ("Mobil") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit dated December 13, 1983, Appendix A hereto.

This decision sustained a trial court judgment awarding trebled antitrust damages for attempted monopoly of a market which could not, as a matter of law, constitute a relevant market for antitrust purposes. Thus, if Mobil had succeeded in the alleged "attempt," no liability for monopolization could have resulted. The trial court judgment was upheld solely on the basis of a unique Ninth Circuit rule which eliminates a dangerous probability of success as an element of a Sherman Act Section 2 attempted monopoly claim, an element required by the decisions of this Court. As would be expected, this Ninth Circuit rule conflicts with the law in every other circuit, causing unnecessary and

confusing litigation in the Ninth Circuit. This confusion is compounded by an intracircuit conflict between the various panels of the Ninth Circuit as to the interpretation and application of this unique rule.

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court below are those named in the caption of the case in this Court.*

OPINION BELOW

The opinion of the Court below is reported at 721 F.2d 1207 and is reprinted as Appendix A.

JURISDICTION

The decision of the Court of Appeals was entered on December 13, 1983. A timely petition for rehearing with suggestion for rehearing en banc was denied by order of February 21, 1984. By order of the Court of Appeals dated March 9, 1984, mandate was stayed until the filing of this petition for writ of certiorari.

This petition for certiorari is filed under Sectior. 2101 of Title 28 of the United States Code within 90 days of denial of Mobil's petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the district court was based upon 15 U.S.C. § 15.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. §1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*Petitioner is a wholly owned subsidiary of Mobil Corporation. See Appendix B for affiliate and subsidiary corporations of petitioner and Mobil Corporation.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Respondents Blanton and Healey are former operators of Mobil service stations in Seattle. They sued Mobil alleging a number of violations of federal antitrust laws. After trial, the jury, by special verdict, found that Mobil engaged in an unlawful tying arrangement by coercing Blanton and Healey to purchase oil, lubricants and TBA&S (tires, batteries, accessories and specialty items) from Mobil C.R. 273, Blanton, 1(b), Healey, 1(b). The jury also found, with regard to Blanton only, that Mobil coerced resale price maintenance in the last quarter of 1974, and

engaged in an illegal boycott by persuading Mobil dealers not to buy Mobil products from Blanton. With respect to each of these specific antitrust violations the jury found that the respondents sustained "$0" damage. C.R. 273, Blanton, 1(c), 2(b), 3(b); Healey, 1(c).

Mobil was also found liable for attempting to monopolize sales to Mobil dealers. The jury special verdict form spelled out precisely the product market which the jury believed Mobil had attempted to monopolize. Ironically, the jury found that, while there was a product market consisting of the sale of *all* automotive products (*i.e.*, all competing brands) to *all* the different dealers in the relevant geographic area, Mobil had *not* monopolized or attempted to monopolize that market C.R. 273, Blanton 4(b) and Healey 2(b). Under the decisional law of this Court, it is clear that this is the *only* market broad enough under the circumstances of this case to qualify as a "relevant market" under the Sherman Act.

However, the jury found that a relevant market or submarket existed "for the sale of Mobil-branded and non-Mobil-branded oil, lubricants and TBA&S to Mobil dealers," and that Mobil did attempt to monopolize this "relevant market or submarket." C.R. 273, Blanton 4(d) and Healey 2(d). The trial court gave the case to the jury on the theory—mandated by the decisions of this Court—that:

> "An attempt to monopolize has three elements: (1) specific intent to monopolize; (2) some act or acts done in furtherance of an intent to monopolize; and (3) which although insufficient to actually produce monopoly power creates a dangerous probability that the defendant will achieve a monopoly of the relevant market." Jury Instruction No. 30, C.R. 268.

As noted above, the jury found with respect to each of the specific antitrust violations (*e.g.*, tying arrangement, group boycott) that the damages respondents sustained were "$0." Yet, on the attempted monopoly claims, the jury awarded damages of $134,585.00 to Blanton and $19,967.00 to Healey. C.R., Blanton, 4(f), Healey, 2(f).

Mobil appealed, pointing out that sales to Mobil dealers could not, as a matter of law, constitute a relevant market for antitrust purposes. The Ninth Circuit did not dispute that the market upon which the jury had based its verdict had no relevance under the Sherman Act. The panel, however, through the expedient of the doctrine in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964), simply declared relevant market irrelevant:

> "We cannot reverse the jury's finding of attempted monopoly by reason of its definition of the relevant market because the jury's finding of *per se* violations of the Sherman Act makes the relevant market finding unnecessary to establish liability."
>
> Opinion, Appendix A-12.

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[1]In so finding, the panel rejected Mobil's contention that since the case was given to the jury on a relevant market theory and because the attempted monopoly portion of the jury verdict was based on a finding that Mobil attempted to monopolize a "relevant market or submarket . . . for the sale of Mobil-branded and non-Mobil-branded oil, lubricants, and TBA&S to Mobil dealers," respondents were precluded from raising the *Lessig* issue at the appellate level. [Appellant's Combined Reply Brief and Answering Brief, pp. 9-11; Opinion, Appendix A-12 to A-14].

The irony of this holding cannot go unnoticed. Liability under Section 1 of the Sherman Act requires a causal connection between the alleged antitrust conduct and the damages claimed. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Such strict causality requirements are here swept aside by holding that a *"per se"* violation causing "$0" damage makes out a Sherman 2 claim by eliminating the requirement of a dangerous probability of monopolization of a "relevant market." Under this analysis, every Section 1 violation would necessarily violate Section 2 of the Sherman Act. Clearly, Congress intended no such result.

Even under the decisional law of the Ninth Circuit relevant market for antitrust purposes cannot be defined as consisting only of sales of fungible automotive products to Mobil dealers.

> "The standard test of the product market is that it comprises those 'commodities reasonably interchangeable by consumers for the same purpose.' *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395; 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956)."
>
> *JBL Enterprises, Inc. v. Jhirmack Enterprises Inc.*, 698 F.2d 1011, 1016 (9th Cir. 1983) *cert. denied*, ... U.S. ....., 104 S.Ct. 106, 78 L.Ed.2d 109 (1983).

As stated in *South End Oil v. Texaco, Inc.*, 237 F.Supp. 650, 656 (N.D. Ill. 1965)[2]:

> "Where [motor oil] products are competitive and reasonably interchangeable, the relevant market cannot be confined to the products of one manufacturer."

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[2]Cited as authority for the trial court relevant market holding in *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 509 F.Supp. 357, 367 (N.D. Calif. 1981) *aff'd* 698 F.2d 1011 (9th Cir. 1983).

Accord: Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 118 (3rd Cir. 1980); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974). The burden of establishing a relevant submarket rested on the respondent dealers. *Gough v. Rossmoor Corp.*, 585 F.2d 381, 385 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). The nature of the product market precludes any such showing. Oils, lubricants, tires, batteries, and accessories distributed by Mobil simply are not "so unique or so dominant" that any action by Mobil to increase control over its products "virtually assures that competition will be destroyed." *Bushie v. Stenocord*, 460 F.2d 116, 121 (9th Cir. 1972).

REASONS FOR GRANTING THE WRIT

In this case, for the first time, a final judgment awarding treble damages for attempted monopoly is being sustained on appeal solely on the basis of *Lessig v. Tidewater*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). Solely on the basis of *Lessig*, Mobil is being held liable for attempting to monopolize sales of oil, lubricants, and automotive products to Mobil dealers, even though sales to such dealers are not, even under the law of the Ninth Circuit, a "relevant market" capable of being monopolized. In sum, *Lessig* rejects this Court's consistent requirement of a "dangerous probability" of success in achieving monopoly power in a relevant market. The dangerous probability element is, of course, what assures that Section 2 will be used to protect "competition" and not "competitors". *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

For 20 years, notwithstanding its rejection by every other circuit in the United States, *Lessig* has been employed—rather unpredictably—to avoid defense judgments in cases lacking any proof of the defendant's position in a relevant market. In the instant case, the jury has spoken, and the danger long implicit in *Lessig*—liability without injury to competition—has occurred. It is therefore now appropriate to determine whether antitrust liability can or should attach for attempting that which, if accomplished, would not violate the antitrust laws.

Numerous grounds require an evaluation, upon certiorari, of the impact of the *Lessig* rule as applied in the Ninth Circuit. *Lessig,* as applied in this case, imposed liability for an attempt to monopolize without reference to any properly defined antitrust relevant market; and, thus, without any showing of adverse effect on competition. Such a result might be appropriate under an "unfair business practices" statute, but is improper under a law designed to prevent a competitor from acquiring monopoly power to set prices and exclude competition. *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 391, 176 S.Ct. 994, 100 L.Ed. 1264 (1956).

Second, *Lessig* allows imposition of damages for attempting to monopolize something which cannot, as a matter of law, constitute a relevant market susceptible of monopolization if the "attempt" had been successful. This unjust result is repugnant to the basic concept that liability for an attempt should only be imposed where succeeding would itself be illegal.

Third, the Ninth Circuit rule is in conflict with the law in every other U.S. circuit. The conduct of business is thus

subject to two vastly dissimilar applications of the same law, depending merely on geographic location.

Finally, under *Lessig,* liability is unpredictable because of its uneven application by the various panels of the Ninth Circuit. This lack of clarity, together with the basic irrationality of the *Lessig* doctrine, has caused much unnecessary litigation and attendant squandering of judicial resources. For all of these reasons, it is appropriate and important for this Court to examine the *Lessig* rule upon writ of certiorari.

I

IMPOSITION OF LIABILITY FOR ATTEMPTED MONOPOLY WITHOUT SHOWING OF DANGEROUS PROBABILITY OF MONOPOLY POWER DISREGARDS THE DECISIONS OF THIS COURT

The Ninth Circuit panel sustained an antitrust jury verdict based on a jury finding that Mobil attempted to monopolize a "relevant market or submarket" consisting of the sale of "Mobil-branded and non-Mobil-branded oil lubricants and TBA&S to Mobil dealers." Mobil appealed, pointing out that this "relevant market or submarket" could not, as a matter of law, constitute a relevant market for antitrust purposes. Under the law of the Ninth Circuit, a market limited to sales to dealers of a particular manufacturer is not a relevant market for antitrust purposes. *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.,* 698 F.2d 1011 (9th Cir. 1983) *cert. denied,* ..... U.S. ....., 104 S.Ct. 106, 78 L.Ed.2d 109 (1983). Relying on the *Lessig* rule, however, the Ninth Circuit panel hearing this case refused to address the relevant market issue stating:

"We cannot reverse the jury's finding of attempted monopoly by reason of its definition of the relevant market because the jury's finding of *per se* violations of the Sherman Act makes the relevant market finding unnecessary to establish liability."

Opinion, Appendix A-12.

Beginning with *Swift and Company v. United States,* 196 U.S. 375, 396 (1905), this Court has repeatedly held that dangerous probability of monopoly power is a necessary element of proof in an attempted monopoly claim. *Lorain Journal Co. v. United States,* 342 U.S. 143, 153, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *United States v. Griffith,* 334 U.S. 100, 105-106, 68 S.Ct. 941, 92 L.Ed. 236 (1948); *American Tobacco Co. v. United States,* 328 U.S. 781, 785, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). The logic for this requirement is obvious:

"To establish monopolization or attempt to monopolize a part of trade or commerce under Section 2 of the Sherman Act, it [is] necessary to appraise the exclusionary power . . . in terms of the relevant market where the product is involved. Without a definition of that market there is no way to measure . . . ability to lessen or destroy competition."

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965).

Clearly, a relevant market for antitrust purposes cannot be limited to sales of branded and non-branded products by a single manufacturer-distributor to its dealers.[3] Rather,

[3]The Ninth Circuit criticized Mobil for failing to distinguish between "Mobil-branded and brokered" and "Mobil-branded or non-Mobil-branded" products. See panel Opinion, Appendix A-10, n. 4. The distinction suggested makes no difference for relevant market purposes under the *du Pont* doctrine of functional interchangeability.

the relevant market must be defined to include sales of all interchangeable products to similarly situated dealers with whom the Mobil dealers compete. Here, that market must be defined to include all sales of oil, lubricants, and TBA&S to all service station dealers with whom respondents competed—the very market which the jury expressly found in the present case that Mobil neither monopolized nor attempted to monopolize. C.R. 273, Blanton 4(b); Healey 2(b).

The fundamental purpose of the antitrust laws is to protect competition, not competitors. *Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 487, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). The undeniable fact in this case is that the automotive products distributed by Mobil are, to the consumer, interchangeable with the products of Mobil's competitors. Respondents did not therefore seriously attempt to establish a relevant submarket as was their burden. *Gough v. Rossmoor Corp., supra,* 585 F.2d at 385. Nor did respondents suggest that if Mobil monopolized the distribution of its automotive products, it would be able to "control prices or to exclude competition." *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). The converse is too obvious to seriously dispute. If Mobil dealers were required by Mobil's alleged predatory conduct to price their Mobil branded/distributed products at too high a price, the consuming public would simply purchase comparable products of other suppliers available at other, non-Mobil service stations. Thus, control by Mobil of prices at Mobil service stations

(through monopolization of wholesale sales) simply could not damage competition in a manner cognizable under federal antitrust laws.

II

THE COURT OF APPEALS UNJUSTLY IMPOSED LIABILITY FOR ATTEMPTING TO MONOPOLIZE A "MARKET" WHICH CANNOT BE MONOPOLIZED

It is the well-established law of the Ninth Circuit that monopoly power in a relevant market must be demonstrated to establish a claim of actual monopolization. *E.g., Greyhound Computer Corp. v. IBM,* 559 F.2d 488, 493 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). To construe the attempt provision wholly without regard to the monopolization that is its asserted objective, and to view the attempt violation in isolation from such monopolization, divorces the concept of attempted monopolization from its statutory language and historical context. *See, National Society of Professional Engineers v. United States,* 435 U.S. 679, 688, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 498-500, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); *Standard Oil Co. v. United States,* 221 U.S. 1, 50-51, 59, 61, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *see also, e.g.,* 21 Cong. Rec. 3149, 3151-3152 (1890). *See also,* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 Michigan L.Rev. 373, 433-434 (1974); Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine,* 58 Cornell L.Rev. 1121, 1125 & n. 19 (1973).

In reliance on this well-established principle, several courts in other circuits have expressly rejected *Lessig. See,*

e.g., Unibrand Tire & Product Co. v. Armstrong Rubber Co., 429 F.Supp. 470, 476-477 (W.D.N.Y. 1977); *see also, infra* p. 14, n. 5. As noted by one court:

> "It would defy all logic to find on the one hand that there is a dangerous probability of monopolization by Chrysler, and, on the other hand, to find that the market which is threatened is not the relevant market and hence not susceptible to unlawful monopolization. *See American Football League v. National Football League,* 205 F.Supp. 60, 65 (D.Md. 1962), *aff'd.,* 323 F.2d 124 (4th Cir. 1963). Clearly, one can threaten to monopolize only that which is capable of being monopolized, and only the relevant market is capable of being monopolized. Accordingly, contrary to plaintiff's contention, the relevant market is a basic issue in a case charging an attempt to monopolize."
>
> *Merit Motors, Inc. v. Chrysler Corp.,* 417 F.Supp. 263, 270 (D.C.D.C. 1976), *aff'd,* 569 F.2d 666 (D.C. Cir. 1977), footnote omitted.

Here, through the jury's special finding, we know the injustice foreseen in *Merit Motors* has materialized. Mobil, through the panel's reliance on *Lessig,* has been held liable for attempting to monopolize a market "not susceptible to unlawful monopolization." This unsupportable and manifestly unjust result was only possible because, *contrary to the decisions of this Court and law of all the other circuits, Lessig instructs that for an attempt claim relevant market is "not in issue."*

III

THE LESSIG RULE SHOULD BE ABOLISHED TO ELIMINATE THE CONFLICTS BETWEEN THE NINTH CIRCUIT AND ALL OTHER COURTS OF APPEAL

In the twenty years since the *Lessig* rule eliminated the element of dangerous probability of successful monopolization, every other circuit in the United States has reaffirmed that a showing of dangerous probability is essential to establish an attempted monopoly claim.[4] Numerous circuits have expressly declined to follow *Lessig*,[5] and criticism of

[4]*See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1096 (3d Cir. 1978); *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982); *United States v. Empire Gas Co.*, 537 F.2d 296, 298-299 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed. 572 (1977); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 306 (10th Cir. 1975), *cert. denied*, 425 U.S. 907, 96 S.Ct. 1501, 47 L.Ed.2d 758 (1976); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F.Supp. 263, 269 (D.D.C. 1976), *aff'd on other grounds*, 569 F.2d 666 (D.C. Cir. 1977).

[5]*See, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-712 (7th Cir. 1979), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed. 601 (1980); *Spectrofuge Corp. v. Beckman Instruments, Inc., supra*, 575 F.2d at 276 and n.69 (5th Cir.); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *E. J. Delaney Corp. v. Bonne Bell, Inc., supra*, 525 F.2d at 305 (10th Cir.); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., supra*, 508 F.2d at 550 (1st Cir.); *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 287 (8th Cir.), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973).

cases which have been extensive.[6] The conflict between the Ninth Circuit interpretation of Section 2 of the Sherman Act and the interpretation of all other circuits is alone ample ground for issuance of a writ of certiorari in this matter. *Monsanto Company v. Spray Rite Service Corp.*, ... U.S. ....., 41 Antitrust Trade Reg. Rep. (BNA) 603 (1984).

[6]*See* ABA Section of Antitrust Law, *Antitrust Civil Jury Instructions* 112-114, 118-119 (1980); 3 Areeda & Turner, *Antitrust Law* ¶ 820, at 312, ¶ 831, at 335-336, ¶ 832, at 336-339, ¶ 835a, at 346 (1978); 3 Devitt & Blackmar, *Federal Jury Practice and Instructions* §§ 90.24, 9029 (3d ed. 1977); Hampton, Hibner, & Varner, *Horizontal Restraints of Trade—The Sherman Act* § 1.63-1.64, in Hills, *Antitrust Adviser* (2d ed. 1978); 3 von Kalinowski, *Antitrust Laws and Trade Regulation* §§ 9.01[1], 9.01 [2] (1981); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich.. L.Rev. 373, 375, 384-385, 419 (1974); Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U.Pa.L.Rev. 125, 125-126, 128-129, 154 n.114, 196, 170 (1980); Hawk, *Attempts to Monopolize—Specific Intent As Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1122, 1135, 1150 & n.138 (1973).

IV

THE LESSIG DOCTRINE'S CONVERSION OF SECTION 2 OF THE SHERMAN ACT INTO A GENERAL BUSINESS REGULATION STATUTE WITHOUT REGARD TO EFFECTS OF PROHIBITED BEHAVIOR UPON COMPETITION IS A MISAPPLICATION OF THE ANTITRUST LAWS OF THE UNITED STATES

Although, as discussed below, the history of *Lessig* has not been without its vicissitudes, the rule has been repeatedly employed in the past 20 years in a variety of contexts, though never as the sole basis for affirming a final antitrust judgment.[7] The Ninth Circuit's insistence on adherence to some form of the rule, even in the face of extensive and outspoken criticism by the other circuits and many commentators, suggests that *Lessig* rests on some

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[7]For example, in two of the Ninth Circuit cases which since *Lessig* have affirmed final antitrust judgments of attempted monopoly, a proper relevant antitrust market was found to exist. In *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982), *cert. denied* 459 U.S. 1009, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982) the attempt judgment was affirmed (without reference to *Lessig*) because:

> "Sportservice's conduct, as evidenced by this record, was sufficient for a conclusion that such conduct formed the basis for a substantial restraint of trade, was clearly exclusionary, and *clearly threatening to competition in the relevant concession-franchise market.*"
>
> 676 F.2d at 1309, emphasis added.

The proper definition of that relevant market had been the subject of an earlier appellate decision, 512 F.2d 1264 (1975).

In another attempt case affirming plaintiff's final judgment, *Pacific Coast Agr. Export Assn. v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975) *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976), the jury specifically found specific intent to monopolize a relevant market, and monopoly power. 546 F.2d at 1205. The attempt claim was discussed without mention of *Lessig*.

unarticulated policy deemed important by some (but less than all) panels of the Ninth Circuit.

The unstated assumption implicit in the *Lessig* doctrine seems to be that the Sherman Act ought to be a refuge for all complaints of unfair conduct by manufacturers toward their dealers, or between competitors in general—irrespective of whether the *public interest* in the benefits of competition is threatened by that conduct. Thus, the doctrine punishes, as an "attempted monopoly", any business misconduct that seems "predatory;" *per se* violations often being the catalyst for invoking the *Lessig* rule. While it is true that *per se* violations are deemed inherently anticompetitive, there are, of course, well established measures of damages (trebled) to punish such conduct. The danger of assigning additional significance to *per se* conduct is demonstrated in this case. Here—even assuming that the jury did not mean what it said when it found that these specific acts caused "$0" damages—the trial record clearly demonstrates that the "attempt" damages awarded far exceed the specific damages which respondents claimed. For example, the total amount of price-fixing damages claimed by Blanton was $5,937.02 [Trial Exhibit 286] and the total amount of overcharge on all allegedly tied goods actually purchased from Mobil by Blanton was only $3,109.20 [Trial Exhibit 285]. The total figure of tying damages claimed by Healey based on products actually purchased from Mobil was only $3,365.00 [Trial Exhibit 277]. Clearly these damages fall far short of the jury's catch-all award, and demonstrate the absence of any proof of causation. Such "highly speculative" damages are improper and constitute a separate ground for reversal. *Associated General Contractors of California v. California*

State Council of Carpenters, ... U.S. ....., 103 S.Ct. 897, ... L.Ed. ..... (1983).

As this case clearly demonstrates, *Lessig* strips the attempted monopoly doctrine of its *antitrust* objectives and converts it, in essence, into but another "unfair business practices" statute. This broad interpretation of Sherman Act Section 2 goes far beyond those articulated by this Court or any other court outside the Ninth Circuit. *See, Hunt v. Crumboch,* 325 U.S. 821 (1945), 65 S.Ct. 1545, 89 L.Ed. 1954; *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 483, 497-500, 60 S.Ct. 982, 84 L.Ed. 1311 (1940).

Indeed, there is absolutely no reason to undertake this statutory re-construction, because the "attempted monopoly" conduct which *Lessig* seeks to punish is addressed by laws already in place. These include, first and foremost, specific antitrust law prohibitions against tying arrangements, group boycotts and the other *"per se"* conduct (with attendant treble damages). In addition, there exists the whole panoply of state and federal legislation which protects businesses such as those of respondents.[8]

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[8]As an example, in its opinion here, the panel held Washington's Franchise Investment Protection Act, Wash. Rev. Code § 19.100.010 *et seq.*, to be applicable to these dealers' relationship with Mobil. Washington also has a Consumer Protection Act, RCW § 19.86 *et seq.*, which is broadly applied to cover a variety of commercial wrongs. *Anhold v. Daniels,* 94 Wash.2d 40, 614 P.2d 184 (1980). Moreover, Washington courts (as is true in most if not all the other states) have long recognized the tort of interference with business relationships, which also has broad application. *Calbom v. Knudtzon,* 65 Wash.2d 157, 396 P.2d 148, 151 (Wash. 1964); *Cherberg v. Peoples Nat. Bank of Washington,* 564 P.2d 1137, 1142 (1977).

Whatever rationale might once have existed to support the *Lessig* rule has long since vanished. Today, *Lessig* stands out in irreconcilable contradiction to the concepts underlying the federal antitrust laws. Neither this Court, nor any other court in the United States, has placed such an interpretation on the prohibition of attempted monopoly. Indeed, in light of the product interchangeability doctrine enunciated in *du Pont, supra,* the *Lessig* rationale is clearly inappropriate.

The judgment in the instant case makes clear many of the ramifications of the *Lessig* rule. Even if the sole result of that unique Ninth Circuit rule were to subject businesses within the boundaries of the Ninth Circuit to a peculiar interpretation of federal law, *Lessig* should nonetheless be overturned. However, the unfortunate effects of the rule are much more pervasive.

V

THE LESSIG RULE IS APPLIED INCONSISTENTLY BY THE NINTH CIRCUIT

The purpose of Sherman Act Section 2 is to prevent attempts to acquire monopoly power, *i.e.,* power to control price and exclude competition. An interpretation of Section 2 that prohibits, as an "attempt," behavior which cannot result in monopoly power, makes no sense. Perhaps for this reason confusion has reigned even within the Ninth Circuit regarding the nature of the *Lessig* rule and its application. The doctrine has had a checkered history in the 20 years since its birth. Occasionally, panels simply overlook the rule and decide attempt cases without reference to *Lessig. See: A.L.W., Inc. v. United Airlines, Inc.,* 510 F.2d 52 (9th Cir. 1975); *Case-Swayne Co. v. Sunkist Growers,*

Inc., 369 F.2d 449, 454-59 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967); *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.*, 341 F.2d 653 (9th Cir. 1965), *cert. denied*, 382 U.S. 817, 86 S.Ct. 42, 15 L.Ed.2d 64 (1965). Some panels have apparently abandoned the rule—*Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 833 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972), 92 S.Ct. 715, 30 L.Ed.2d 740; *Bushie v. Stenocord*, 460 F.2d 116, 121 (9th Cir. 1972)—but not without criticism. *Hallmark Industry v. Reynolds Metal Company*, 489 F.2d 8, 12, n.3 (9th Cir. 1973), *cert. denied*, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1973). However, even those cases acknowledging *Lessig* arrive at widely variant results.

For example, very recently in *M. A. P. Oil Co. v. Texaco*, 691 F.2d 1303 (9th Cir. 1983), the Ninth Circuit affirmed a defendant's judgment, *inter alia*, because of plaintiff's failure to establish "a substantial claim of restraint of trade, from which the specific intent required for an attempt claim could be inferred." 691 F.2d at 1309. While acknowledging *Lessig*, the court inconsistently held that some sort of market definition is essential if the concept of specific intent to monopolize is to have any meaning:

> "The *attempt element of specific intent to control prices or destroy competition cannot exist in a vacuum. Without some framework* within which the activities of competition and pricing take place, whether that framework be called a market or some other name, *Texaco could never have 'specific intent to control prices or destroy competition.'* This case is devoid even of that bare framework, and therefore we agree with the trial court's dismissal of plaintiffs' attempt claim."
>
> 691 F.2d at 1309, emphasis added.

In yet another recent case, a different Ninth Circuit panel used the confusion engendered by *Lessig* as the basis for avoiding its application:

> "Although this court has periodically stated that dangerous probability of successful monopolization is also an indispensable element [of attempt to monopolize], *e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir.) (as amended), *cert. denied* 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 61 (1982); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), cert. denied, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978), there is also Ninth Circuit authority for the view that probability of success is merely circumstantial evidence of intent. *E.g., Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982); *Blair Foods, Inc.*, 610 F.2d at 669; *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), cert. denied, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). We need not add further fuel to the controversy by adding our opinion regarding the inquiry's proper significance, because, as discussed below, there was sufficient evidence of McDonnell's probability of success to avoid summary judgment."
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> *Northrup Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 at 1057-1058 (9th Cir. 1983), footnote omitted.

Yet other panels have seemed resigned to accepting the *Lessig* rule without defending it. "Despite the substantial criticism of *Lessig*, it is still the law of [the Ninth] Circuit to which [each] panel is bound." *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977).

Out of this background of confusion, one thing is clear: the Ninth Circuit's continued acceptance of *Lessig* in some—albeit unpredictable—form, is exceedingly burdensome.

Lessig has caused costly expenditures of judicial resources in the Ninth Circuit. There is more—much more—attempted monopoly litigation in the Ninth Circuit than any other circuit. As Professor Handler has noted, the Ninth Circuit, by eliminating the dangerous probability element of Section 2 and thereby "encourag[ing] a greater number of . . . suits where evidence of market power is all but nonexistent . . . has written over thirty opinions on this one topic since *Lessig*, or more than one-third of all of the appeals reported on attempted monopolization during that time in all the circuit courts." *Handler & Steuer, Attempts To Monopolize And No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 174 (1980).

This explosion of attempted monopoly litigation is no coincidence. It is the inevitable result of the Ninth Circuit's confusing effort to use *Lessig* to convert Sherman Act Section 2 into an unfair business practices statute.

CONCLUSION

The time has clearly come to at last to put an end to the Ninth Circuit's aberrational *Lessig* rule. The rule has now been resoundingly rejected by all other circuits. It conflicts with this Court's requirement of dangerous probability of success. It subjects businesses within the boundaries of the Ninth Circuit to radically different application of the federal antitrust law. The rule itself is subject to radically different interpretations even by the Court which

gave it birth. It sweeps aside the causality requirement for imposition of antitrust liability and substitutes general business losses unconnected to prohibited antitrust conduct. For years, this has resulted in excessive and unnecessary litigation.

In the case at bar, for the first time, a final antitrust judgment of treble damages has been sustained solely on the basis of *Lessig*. By ignoring relevant market and dangerous probability of success, a catch-all award of damages has been allowed where the specific and appropriate measures of damages for the antitrust conduct found supports only a fraction, if any, of the damage award. This unjust result should not be permitted to stand.

Dated: May 21, 1984.

Respectfully submitted,

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(Appendices follow)

Appendix A

Jerry A. Blanton,
Plaintiff-Appellee/Cross-Appellant,

v.

Mobil Oil Corporation, a
corporation,
Defendant-Appellant/Cross-Appellee.

Roy H. Healey,
Plaintiff-Appellee/Cross-Appellant,

v.

Mobil Oil Corporation, a
corporation,
Defendant-Appellant/Cross-Appellee.
Nos. 82-3359, 82-3394.
United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 6, 1983.
Decided Dec. 13, 1983.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, CHOY and NELSON, Circuit Judges.

CHOY, Circuit Judge:

Jerry Blanton and Roy "Bud" Healey, the plaintiffs below, are former operators and lessees of service stations located in Seattle and owned by defendant Mobil Oil Corporation. Blanton was a Mobil dealer from August 30, 1973, until October 8, 1976. Healey operated his Mobil station from February 19, 1974, until March 8, 1977. Both dealers

sued Mobil contending that during their respective tenures, Mobil damaged their businesses in violation of the Sherman Act, 15 U.S.C. §§ 1, 2, section 3 of the Clayton Act, 15 U.S.C. § 14, the Washington Consumer Protection Act, Wash.Rev.Code § 19.86.010 *et seq.*,[1] and the Washington Franchise Investment Protection Act ("FIPA"), Wash. Rev.Code § 19.100.010 *et seq.* They further alleged in diversity that their individual terminations as Mobil dealers involved fraud and breach of contract under Washington law.

After a lengthy trial, the jury returned special verdicts in favor of both plaintiffs. The jury found that Blanton had suffered $134,585 in antitrust damages and $94,628 in other damages. Healey was found to have sustained $19,967 in antitrust damages and $11,144 in other damages. By special verdict, the jury found that both Blanton and Healey had been subjected to unlawful tying arrangements, attempted monopolization, breach of contract, and fraud. The jury also found that Blanton had been a victim of coerced resale price maintenance and a group boycott aimed at his separate retail operations. Mobil's post-trial motions for judgment n.o.v. or new trial were denied. Mobil appeals the antitrust and contract/fraud awards.[2] Blanton and Healey cross- appeal the court's grant of a directed verdict in favor of Mobil on the FIPA claim.

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[1]Washington's Consumer Protection Act contains trade regulation that parallels the federal antitrust statutes. It expressly directs that its purpose is to "complement the body of federal law." Wash.Rev. Code § 19.86.920. *See State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 82 Wash.2d 265, 271, 510 P.2d 233, 238 (1973).

[2]Included in the single damages awards were small sums for minor claims sounding in contract that arose during the period prior to lease termination. On appeal, Mobil has not contested these smaller awards.

We affirm the antitrust judgment and reverse and remand both the contract/fraud judgment and the directed verdict on the FIPA claim.

I

FACTS

The prime focus of this case is on the methods used by Western Washington Mobil agents to sell motor oil and "TBA & S"—tires, batteries, accessories and specialties—to Mobil dealers who lease their stations from Mobil. This thread knits together almost all charges in this lawsuit, since both Blanton and Healey alleged that their leases were terminated because they refused to purchase Mobil automotive products. The plaintiffs presented substantial evidence that certain Mobil agents used their double role as landlords and salesmen to gain an illegal competitive advantage for Mobil products.

A. *Antitrust Claims*

1. *Tying Arrangements*

The jury found that Mobil had imposed an illegal tying arrangement on both Blanton and Healey, a violation of Clayton Act § 3 and a *per se* violation of Sherman Act § 1. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). Mobil motor oil and TBA & S were tied to the lease and gasoline supply contract. Clayton Act § 3 requires that both the tying and tied products be "goods, wares, merchandise, machinery, supplies, or other commodities. . . ." Gasoline as a tying product and motor oil and TBA & S as tied products fall within this definition. *See Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346, 352 (5th Cir.1965). A lease of real property, while

not covered by Clayton Act § 3, can be a tying product under Sherman Act § 1. *See Northern Pacific.*

Blanton and Healey each testified that they were threatened with termination of their dealerships unless they purchased Mobil motor oil and TBA & S. Blanton specifically testified that after he refused to make a large Mobil tire purchase, Mobil representatives made an inspection of his station and cited him for lease violations that included placement of trash in the trash enclosure, an unauthorized handle guard on the bathroom door that had been affixed to avoid vandalism, and damage to his personally owned desk. Mobil representatives confirmed the details of the inspection.

Other Western Washington Mobil dealers also testified that Mobil marketing representatives had threatened their leases in order to coerce purchases of Mobil products. George Peterson testified that the subject of his lease was raised when a Mobil representative attempted to sell him tires. Dick Page testified that Mobil's area manager asked him who was going to fill his gas tanks and maintain his station if he did not buy Mobil tires. Jimmy Scott was told that if he did not purchase Mobil products, Mobil might have to find a new station operator.

The pricing of Mobil products, particularly motor oil, supported the plaintiff's assertion that Mobil dealers were used as captive consumers of Mobil products. There was unrebutted testimony that Mobil sold its motor oil to dealers at a price substantially above that at which Mobil oil was sold at retail by Safeway grocery stores and independent distributors. In fact, one Seattle area dealer, who owned his station and was thus not subject to any tying arrange-

ment, testified that he found it economically preferable to drive across the Cascade Mountains to purchase Mobil motor oil from a distributor in Yakima than to purchase oil directly from Mobil in Seattle.

While Mobil representatives denied the existence of a tying arrangement, the district manager during the relevant period, Donald Hotsenpiller, did admit that purchases of oil and TBA & S were "considered" when Mobil decided whether to renew a station lease.

2. *Resale Price Maintenance*

Although it may not be self-evident that resale price maintenance in an effort to reduce prices would be an inevitably pernicious practice, it is well settled that maximum resale price fixing is a *per se* violation of the Sherman Act § 1. *Albrecht v. Herald Co.*, 390 U.S. 145, 151-54, 88 S.Ct. 869, 872-874, 19 L.Ed.2d 998 (1968). The jury found that Blanton had been coerced into lowering the price of his gasoline 5 or 6 cents per gallon during the last three months of 1974. Blanton's net profits fell during this period. Mobil had argued that the lower retail price was merely suggested, but the jury decided otherwise.

3. *Group Boycott*

The jury found that Blanton had been damaged by a group boycott as a result of coercion by Mobil. A group boycott, even one aimed against a single merchant, is a *per se* violation of the Sherman Act. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13, 79 S.Ct. 705, 709-10, 3 L.Ed.2d 741 (1959); *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1381 n. 3 (9th Cir. 1962), *vacated on other*

grounds, ... U.S. ....., 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983).

The evidence on this charge dealt with Mobil's attempts to discourage Mobil dealers from purchasing motor oil and TBA & S from Blanton. Blanton had been designated a "Key Dealer" for Mobil brand tires. In this capacity, Blanton was consigned Mobil tires which were to be available to local dealers on a fill-in basis. However, Blanton was not satisfied with that capacity. He determined that he could sell a range of Mobil products to Mobil dealers at prices below that available to the dealers direct from Mobil. This would be accomplished by purchasing Mobil products from independent distributors. Plaintiff Healey and three other Mobil dealers testified that they had been instructed by Mobil not to purchase Mobil products from Blanton. Mobil's Hotsenpiller stated at trial, "I think also maybe Jerry Blanton wanted to grow bigger than Mobil's policies and procedures would maybe want him to grow." R.T. 1879. Faced with a declining market for his distribution of Mobil products, Blanton abandoned his resale operation. Subsequent to termination of his dealership by Mobil, Blanton returned to selling motor oil and TBA & S from various producers, with considerable success.

4. *Other Anticompetitive Acts*

Plaintiffs also alleged that Mobil withheld performance of its obligations as landlord to coerce purchases of Mobil products and interfered with the advertising and promotional activities of Mobil dealers.

Several dealers testified that marketing representatives would raise the question of Mobil product purchases when

service station maintenance was sought from Mobil. One former marketing representative, James Stueck, testified that he would tell dealers that increased purchases of Mobil TBA & S could expedite station maintenance. Blanton testified that he was told that if Delco could sell him batteries, Delco could paint his station.

Dealers testified that Mobil representatives insisted they curtail advertising and promotion of non-Mobil products. Mobil also placed restraints on the use of advertising for Mobil products.

The jury found in Mobil's favor on the claim of monopolization under section 2 of the Sherman Act. However, the jury did conclude that Mobil had made an attempt to monopolize in violation of section 2 and aggregated all antitrust damages for each plaintiff under the attempt claim.

B. *Contract/Fraud Claims*

The leases that Blanton signed in 1973 and Healey signed in 1974 contained "evergreen clauses" providing for automatic renewals at current rental rates. However, the clauses had an exception, which stated that the lease "shall terminate at the end of any current period (original or renewal) by notice from either party to the other, given not less than 90 days prior to such termination." Blanton and Healey testified that they were told at the time of contract execution that the exception for unilateral termination would be exercised by Mobil only if Mobil had good cause to terminate. Moreover, their purchasing decisions as "independent businessmen" would not be considered in the renewal process. They further testified that they were told

that their leases would be renewed for a total term of 8 years, assuming good performance by the dealers. Evidence of these oral modifications was admitted under Washington's parol evidence rule.

The jury found that Mobil had breached its contracts with Blanton and Healey by refusing to renew their leases. It further found that Mobil had engaged in promissory fraud or fraudulent misrepresentations in connection with the refusal to renew. Blanton and Healey had argued that they were terminated because of their eventual decisions to scale down their purchases of Mobil products, even though they had been assured that their Mobil purchases would not be a consideration in the renewal process.

C. *Franchise Investment Protection Act (FIPA) Claim*

The Washington FIPA, Wash.Rev.Code § 19.100.010 *et seq.*, is a comprehensive scheme of franchise regulation that places specific obligations upon a franchisor and rights in a franchisee. *Laurence J. Gordon, Inc. v. Brandt, Inc.*, 554 F.Supp. 1144, 1159 (W.D.Wash.1983); *see generally* Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash.L.Rev. 291 (1973). The district court granted Mobil a directed verdict on this count, ruling from the bench, as a matter of law, that the FIPA was not meant to apply to situations such as were presented in this case.

II
ANTITRUST ISSUES

Mobil makes three arguments for reversal of the antitrust judgment. It argues (1) the special verdict is irreconcilably inconsistent; (2) the jury's relevant submarket finding is clearly erroneous and requires reversal of the attempted monopoly judgment; and (3) Blanton and

Healey failed to prove causal antitrust damages. We find none of these arguments persuasive.

A. *Jury Verdict*

In filling out the special verdict form, the jury entered $0 damages for each of the separate charges of tying arrangements, price fixing, group boycott, and other anticompetitive business practices, although the jury specifically found for the plaintiffs on each of these counts. Antitrust damages were only entered under the jury's finding that Mobil had attempted monopoly in violation of section 2 of the Sherman Act. However, below the amount entered in damages for attempted monopoly, the special verdict asked, "which damages are included in the figure set forth [as damages for attempted monopolization]?" In answer to this question, the jury listed all the antitrust counts which it had found in favor of the plaintiffs but had not assigned damages.

As Mobil concedes, "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962). Mobil argues that the jury findings cannot be resolved consistently because the damages awarded for attempted monopoly were, in Mobil's terms, "exactly the same" as the damages suffered by the plaintiffs from all the component antitrust violations for which $0 damages were specifically awarded. Mobil might have a point if the jury did not specifically indicate that damages for all the component antitrust violations were included in the amount awarded for attempted monopoly. The jury was specifically instructed that "[a] plaintiff cannot recover twice for the same injury,

even though he may have two or more theories. Whatever injury a party suffered may only be compensated once." Instruction No. 39. In light of this instruction, the jury's decision to aggregate all damages under the overreaching attempt violation is not only reconcilable, but sensible.

B. *Relevant Market*[3]

The jury found that Mobil had attempted to monopolize a relevant submarket consisting of sales of "Mobil-branded and non-Mobil-branded oil, lubricants, and TBA & S to Mobil dealers." Mobil apparently contends that this relevant market, as found by the jury, is clearly erroneous.[4] The question whether a particular relevant market does or does not exist is one of fact, and a jury's finding of a relevant market cannot be disturbed unless it is clearly erroneous. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299 (9th Cir.), *cert. denied*, ... U.S.

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[3]This discussion pertains only to the finding of attempted monopoly.

[4]Mobil actually argues that the jury found an erroneous submarket consisting of "Mobil-branded and Mobil-brokered" automotive products. If this submarket really had been found, Mobil's cause may have been aided by the common rule that a manufacturer has a natural monopoly over his own products, and does not violate the antitrust laws unless he uses the natural monopoly to gain control of the market in which his product competes. *See Bushie v. Stenocord Corp.*, 460 F.2d 116, 120 (9th Cir. 1972). While it is true that Blanton and Healey desired a jury instruction on a submarket consisting of Mobil branded and brokered products, the trial court ultimately declined to give that instruction. The relevant submarket referred to in the jury instructions and the jury's special interrogatories appears as stated in text above. Blanton and Healey's answering brief noted this error in Mobil's argument, yet Mobil renewed the same relevant market description in its reply brief. We admit to some puzzlement over Mobil's persistent mischaracterization of the jury verdict.

....., 103 S.Ct. 364, 74 L.Ed.2d 400 (1982). Since Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding, we are apparently asked to rule as a matter of law that a relevant submarket cannot consist of sales to dealers licensed by a common oil company.

We need not resolve the legal question presented by Mobil because it is clear that the jury's attempted monopolization finding may be sustained under *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964), and its progeny. In *Lessig*, we stated:

> When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is "not in issue." *United States v. E.I. Du Pont & Co.*, 351 U.S. 377, 395 n. 23, 76 S.Ct. 994 [1007 n. 23], 100 L.Ed. 1264 (1956). Section 2 prohibits attempts to monopolize "any part" of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products.

Id. at 474-75 (footnotes omitted).

Despite the sweeping language of *Lessig*, however, it is clear that we do require a showing of a relevant market in circumstances where the conduct of the attempted monopolizer is ambiguous or not clearly predatory. The current statement of the *Lessig* doctrine is found in *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979), where we stated that "in the absence of proof of relevant

market and market power, the plaintiff must prove either predatory conduct or a *per se* violation of § 1 to prove an attempt to monopolize." *Id.* at 390 (footnote omitted). *Accord M.A.P. Oil Co. v. Texaco, Inc.*, 691 F.2d 1303, 1309 (9th Cir.1982); *see William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1029 nn. 9 & 11 (9th Cir.1981), *cert. denied*, ... U.S. ....., 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).

Under the modified *Lessig* doctrine, Blanton and Healey have clearly sustained their burden of proof regardless of the correctness of the jury's relevant market finding. The jury specifically found that Mobil engaged in *per se* violations of § 1 of the Sherman Act in its promotion of sales of motor oil and TBA & S. Although the *Lessig* doctrine has been subject to criticism, it is the law of this circuit, and we are bound to follow it. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814 (9th Cir.1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). We cannot reverse the jury's finding of attempted monopoly by reason of its definition of the relevant market because the jury's finding of *per se* violations of the Sherman Act makes the relevant market finding unnecessary to establish liability.

Mobil acknowledges that the present case falls within the reach of the *Lessig* doctrine. Indeed, the present case is almost identical on its facts to *Lessig*. Here, as in *Lessig*, the defendant is an oil company accused of using clearly anticompetitive and illegal methods to promote sales of automotive products to its branded service stations. Mobil argues that we should not rely on *Lessig* to uphold the jury verdict because the jury was allowed to find a relevant market, and in fact did identify a relevant submarket. This,

Mobil argues, amounts to abandonment of *Lessig* as a ground for sustaining the jury verdict.

Mobil fails to realize that it is necessary to instruct the jury on relevant market in the event there is no finding of predatory conduct or *per se* violations of the Sherman Act. In the absence of predatory conduct or *per se* violations, an antitrust defendant may still be found liable for attempted monopoly, but only if the antitrust plaintiff can establish a relevant market as a framework for evaluating behavior that does not rise to the level of a substantial restraint of trade. *M.A.P. Oil*, 691 F.2d at 1309. In such a case, a relevant market is needed to evaluate the defendant's market behavior, and thus to determine whether the defendant had the attempt element of "specific intent to control prices or destroy competition." *Id.* In this case, Blanton and Healey needed to instruct the jury on relevant market in the event that the jury found for Mobil on their claims that Mobil committed *per se* violations of the antitrust laws. However, in the presence of *per se* violations, specific anticompetitive intent may be inferred. *Inglis*, 668 F.2d at 1027-28; *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 736-37 (9th Cir.1979).

Further proof that Blanton and Healey did not abandon *Lessig* as precedent for finding Mobil liable for attempted monopolization is shown by their proposed jury instruction No. 20. This instruction relied on the *Lessig* doctrine as a ground for establishing liability on the attempt count, stating that specific intent to monopolize may be inferred from *per se* acts in violation of the Sherman Act. Moreover, the trial court relied on the *Lessig* progeny case of *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926

(9th Cir.1980), *cert. denied,* 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981), to deny Mobil's post-trial motion for judgment n.o.v. There is no unfairness to Mobil in sustaining the jury verdict on the basis of *Lessig,* which, after all, has been the law of this court for almost twenty years.

C. *Causal Antitrust Injury*

Mobil argues that the antitrust judgment must be reversed because Blanton and Healey failed to establish causal antitrust injury as a result of Mobil's anti-competitive acts. Causal antitrust injury is an essential element of an attempted monopoly claim. *California Computer Products, Inc. v. IBM Corp.,* 613 F.2d 727, 736, 738 (9th Cir. 1979).

To establish causal antitrust injury, "the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue." *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 392 (9th Cir.), *cert. denied,* 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957). *Accord Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1205-06 (9th Cir. 1975), *cert. denied,* 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976). We review a trial court's determination that a plaintiff has suffered causal antitrust injury under the "clearly erroneous" standard. *Reid Brothers Logging Co. v. Ketchikan Pulp Co.,* 699 F.2d 1292, 1299 (9th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 280, 77 L.Ed.2d ..... (1983); *see Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 122-23, 89 S.Ct. 1562, 1575-76, 23 L.Ed.2d 129 (1969).

There is substantial evidence that Blanton and Healey were harmed by Mobil's antitrust violations. Undisputed

evidence indicated that the Mobil motor oil that the plaintiffs were coerced into purchasing directly from Mobil was priced substantially higher than Mobil motor oil that was available from independent distributors, including Safeway. Proof in support of Blanton's group boycott claims included direct testimony by Mobil dealers that they would have purchased supplies from Blanton had they not been coerced by Mobil to cease purchases from Blanton. Both plaintiffs' evidence on the damages resulting from Mobil's interference with their advertising was sufficient to raise a jury question of whether the dealers lost anticipated income because of Mobil's actions. There is more than sufficient evidence to support the jury's finding of causal antitrust liability.

Mobil argues that the jury could have found that Blanton and Healey suffered losses from sources other than Mobil's illegal conduct. In this regard, Mobil introduced evidence that the dealers faced losses from road construction, lawful competition, and other external causes. The jury was properly instructed:

> If you find that plaintiffs were injured by these causes, and that the alleged antitrust violations, if proven, were not a substantial factor in causing the injury, plaintiffs' injury would not have been proximately caused by the alleged conduct, and your verdict would have to be in favor of the defendants.

Instruction No. 39. This instruction is fully consistent with our holding in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014 (9th Cir.1981), *cert. denied,* .... U.S. ...., 103 S.Ct. 57, 74 L.Ed.2d 61 (1982), that a defendant's antitrust violations need only be "a material cause" of a business decline. *Id.* at 1051. There is sub-

stantial evidence to support the jury's conclusion that Mobil's anticompetitive actions were a material factor in Blanton and Healey's relative lack of business success.

Perhaps Mobil's arguments are directed at the amount of damages, rather than the fact of damages. So construed, Mobil's arguments are still unavailing. The required quantum of proof necessary to prove the amount of damages is less than that required to prove the fact of damages. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1341 n. 7 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3873 (U.S. May 27, 1983) (No. 82-1938); *Flintkote*, 246 F.2d at 392. This lesser quantum of proof has been described as that sufficient to support a "'just and reasonable estimate of the damage,'" *Pacific Coast Agricultural*, 526 F.2d at 1207 (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946). Generally, we will not reverse the jury's assessment of the amount of damages unless the amount is "grossly excessive or monstrous," *Siebrand v. Gossnell*, 234 F.2d 81, 94 (9th Cir. 1956); *accord Barzelis v. Kulikowski*, 418 F.2d 869, 870 (9th Cir. 1969), or unless the evidence clearly does not support the damage award. *City of Phoenix v. Com/Systems, Inc.*, 706 F.2d 1033, 1039 (9th Cir.1983). A damage award also cannot stand if it "could only have been based on speculation or guesswork." *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1263 (9th Cir.1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982); *see Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946).

In this case, the plaintiffs presented substantial evidence of losses caused by concrete acts of Mobil, particularly the

tying arrangements and group boycott of Blanton. The plaintiffs presented additional evidence comparing profitability from their subsequent service station operations as lessees of another oil company. Evidence was introduced showing that the subsequent unrestrained operations were similar to the restrained operations by reason of station location, station facilities, and gasoline gallonage pumped. This "before and after" evidence, comparing a plaintiff's restrained business with a comparable business operating free of antitrust restraints, is competent evidence of antitrust damages. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 266, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 378-79, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927); *Pacific Coast Agricultural*, 526 F.2d at 1206-07. Blanton and Healey have presented evidence sufficient to justify the amount of antitrust damages awarded by the jury.

III

CONTRACT/FRAUD ISSUES

The jury awarded Blanton and Healey damages for Mobil's termination of their leases under two independent legal theories—breach of contract and fraud. Mobil attacks the award for breach of contract on two grounds. First, Mobil argues, the award is tainted because the trial court improperly allowed the introduction of parol evidence. Second, the damages awarded by the jury failed to account properly for amounts earned by Blanton and Healey in mitigation of their damages. Blanton and Healey respond that the possible infirmity in the contract award is irrelevant in light of the jury's finding that fraud constitutes an independent basis for the award. Mobil answers this de-

fense by asserting that the evidence cannot support a finding of fraud or fraudulent misrepresentation on the part of Mobil.

We are convinced that Mobil is correct in asserting that the jury improperly failed to consider Blanton and Healey's mitigated damages. Although we agree with Blanton and Healey that there is sufficient evidence to support the jury's finding of fraudulent misrepresentation, the fraud finding cannot sustain the judgment either. As discussed below, under Washington law, there is no liability for fraud unless there is "consequent damage" from the fraud. Thus, should it turn out that the plaintiffs' damages from the fraud were totally mitigated, the fraud finding could not stand. Accordingly, we must reverse and remand the jury's damage findings on Blanton and Healey's termination claims for a consideration of mitigated damages. However, since any damages found on remand could be sustained on the fraud count, it is unnecessary to address Mobil's argument regarding the improper introduction of parol evidence.

A. *Contract Damages*

After Blanton and Healey were terminated by Mobil, they operated, with considerable success, a service station leased from another oil company. In order to account properly for the plaintiffs' mitigation of damages, the jury was given a special verdict form designed to allow for simple computation of damages. For each plaintiff, the jury was asked first, "What income would the plaintiff have received for each of the 8 years of the breached renewal contract?" Second, the jury was asked, "How much income did the plaintiff actually receive during each of the eight years?"

The second question was answered as expected. However, the jury did not interpret the first question in the way anticipated. All parties agree as to how the jury *did* interpret the question. For the first question, the jury entered each plaintiff's *mitigated damages,* rather than *income,* for each year in question. However, in those years where mitigating income exceeded contract damages, the jury simply entered "0." This interpretation led the jury to enter damage figures for the first 3 years of the contract period and zeroes for the last 5 years. Blanton and Healey concede that after the third year of the breached contract, their actual income exceeded the projected income from the breached contract with Mobil. Thus, under the jury's interpretation of the first question, the last 5 years of the contract term should not have been characterized as years in which the plaintiffs' damages equaled their income in mitigation. Rather, during these last 5 years, under the jury's reading of the special interrogatory, negative totals should have been entered.

We agree with Mobil that the mitigating income over the full life of the contract must be used to offset damages from the breach. Having asked the jury to compute damages over an 8-year contract period, Blanton and Healey cannot ignore the mitigating income over that full period. Blanton and Healey argue that the contract can be divided into discrete periods of 1 year, and that mitigated damages for any one period is recoverable, even if there is no net injury over the life of the contract. We cannot accept this novel statement of law.

It is a hornbook rule that the purpose of compensatory damages is "to put the injured party in as good a position

as he would have been put by *full* performance of the contract . . . ." 5 A. Corbin, *Corbin on Contracts* § 1002, at 31 (1964) (emphasis added). *See* 11 S. Williston, *A Treatise of the Law of Contracts,* § 1338 (W. Jaeger 3d ed. 1968). Washington law is in full agreement. *Prier v. Refrigeration Engineering Co.,* 74 Wash.2d 25, 30, 442 P.2d 621, 624 (1968). A natural corollary of this rule is that a contract plaintiff is not entitled to receive damages in excess of what he or she would have received if the defendant had fulfilled the breached contract. *Platts v. Arney,* 50 Wash.2d 42, 46, 309 P.2d 372, 375 (1957). Full mitigation must be offset against full damages over the life of the contract to put Blanton and Healey in the position they would have been in had Mobil performed its promise to renew their leases for 8 years.

It is thus necessary to remand the contract judgments for a calculation of fully mitigated damages. It seems likely that Blanton and Healey earned more by leaving Mobil than they would have earned as Mobil lessees. The record, though, does not "permit[] only one resolution of the factual issue," so a remand on damages is required. *Pullman-Standard v. Swint,* 456 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66 (1982).

B. *Fraud*

The jury found as an alternate ground for awarding termination damages that Mobil had fraudulently misrepresented its intent to renew Blanton and Healey's leases regardless of whether they purchased Mobil products. We first consider whether there is evidence sufficient to support a finding of fraud, because in the absence of such evidence, we would be required to determine whether any termination

damages at all can be awarded in light of Mobil's assertions regarding parol evidence of contract terms. Our affirmative answer to this first question requires an examination of whether our mitigation finding on contract damages applies to damages for fraud.

1. *Sufficiency of the Evidence*

Mobil argues that the record does not support a finding of fraud because there is no evidence that Mobil had a specific intention not to perform its promise to renew Blanton and Healey's leases at the time the original leases were signed. Under Washington law, promissory fraud only exists when a promise is made with "a present intent not to attempt the future fulfillment of the promise[ ]." *Fruit Industries Research Foundation v. National Cash Register Co.,* 406 F.2d 546, 550 (9th Cir.1969); *see Markov v. ABC Transfer & Storage Co.,* 76 Wash.2d 388, 396, 457 P.2d 535, 539 (1969). Mobil argues that there is no evidence that it had any intention not to renew Blanton and Healey's leases when it entered into the original leases.

Mobil misconstrues Blanton and Healey's fraud case. Blanton and Healey argued that Mobil asserted that they could be "independent businessmen," buying and selling automotive products from and to whomever they chose, without jeopardizing their leases. They further argued that Mobil had no intention to fulfill this promise, but rather intended to terminate the leases unless the dealers adhered to the "Mobil plan" and made substantial purchases of Mobil motor oil and TBA & S. The evidence was sufficient to support the jury's verdict that Mobil did not intend to renew Blanton and Healey's leases if the dealers did not make substantial purchases of Mobil products.

2. *Fraud Damages*

Although the discussion of mitigated damages in Part III-A, *supra*, was made in the specific context of contract law, the same analysis applies, *mutatis mutandis*, to fraud damages. It is an essential element of a claim of fraud under Washington law that the plaintiff suffer consequent damage from the fraud. *A.B.C. Packard, Inc. v. General Motors Corp.*, 275 F.2d 63, 71 (9th Cir.1960); *Markov v. ABC Transfer & Storage Co.*, 76 Wash.2d 388, 395, 457 P.2d 535, 539 (1969); *Webster v. L. Romano Engineering Corp.*, 178 Wash. 118, 121, 34 P.2d 428, 430 (1934). Failure to prove this essential element is fatal to a fraud claim. *Markov*, 76 Wash.2d at 395, 457 P.2d at 539; *Puget Sound National Bank v. McMahon*, 53 Wash.2d 51, 54, 330 P.2d 559, 561 (1958). If Blanton and Healey gained a net benefit from Mobil's fraud by gaining the opportunity to enter into more advantageous business arrangements, their fraud claim would necessarily fail for lack of consequent damages. The jury's failure to consider Blanton and Healey's full mitigated damages thus requires a remand on the fraud count as well.

IV

FIPA DIRECTED VERDICT

Washington's FIPA has been called the most comprehensive franchise statute of its kind. Annot., 67 A.L.R.3d 1299, 1302-03 (1975). Its regulatory scheme comes into play only if two requirements are met: "(1) the agreement between the parties includes a license to the franchisee to use a trademark or 'related characteristic' of the franchisor, and (2) the franchisee pays a 'franchise fee.'" *American Oil Co. v. Columbia Oil Co.*, 88 Wash.2d 835, 840, 567 P.2d

637, 640 (1977); *see* Wash.Rev.Code § 19.100.010(4). The district court did not issue a memorandum discussing its reasons for directing a verdict for Mobil on the FIPA count. However, in its motion for a directed verdict, Mobil made essentially two arguments. First, it argued that service station agreements are not within the ambit of the statute. Second, it argued that even assuming service stations are covered by the FIPA, Blanton and Healey did not pay a "franchise fee" within the meaning of the statute.

In our review of the directed verdict below, we are "bound to view the evidence in the light most favorable to [the nonmoving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962) (footnote omitted). *Accord Greyhound Computer Corp. v. International Business Machines Corp*, 559 F.2d 488, 492 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). To the extent the directed verdict depends on an interpretation of state law, we normally give deference to the interpretation of the district judge. *Feldman v. Sirrine Industries, Inc.*, 679 F.2d 1299, 1306 (9th Cir.1982). However, here the district court gave no basis for its interpretation. We are convinced that (1) any interpretation of the FIPA that would include a blanket exception for service stations would be clearly wrong; and (2) there is substantial evidence to support Blanton and Healey's assertion that a franchise fee was paid to Mobil.

A. *Service Station Exemption*

The FIPA does allow for certain exemptions from its coverage. The only businesses fully exempted from the

statute are motor vehicle dealer franchises. Wash.Rev. Code § 19.100.010(4)(c). Additionally, certain credit and insurance transactions do not come under the provisions of the FIPA. *Id.* § 19.100.010(4)(a)-(b). The FIPA grants no exemption, by its terms, to gasoline service stations.

Mobil argues that an exemption for service stations was created by the *American Oil* case. In that case, plaintiff Columbia claimed that it was in a franchise relationship with defendant American because it had purchased "tires, batteries, accessories and fuel oils" from American. Columbia further argued that a franchise fee was paid in the form of a rental of signs and credit card imprinters from American. 88 Wash.2d at 841, 567 P.2d at 641. The court ruled that these purchases did not establish a franchise with American. The court's explanation for this ruling was not that service stations were exempt from the FIPA. Rather, the court stated, "These purchases and rental charges are specifically excluded from the definition of a 'franchise fee.' Consequently, there was no payment of a 'franchise fee' by Columbia to American." *Id.* (citation omitted).

The court cited for this holding Wash.Rev.Code § 19.100.010(11)(a), (e), which gives two exceptions to the general definition of a franchise fee. These exceptions are:

> (a) the purchase or agreement to purchase goods at a bona fide wholesale price; . . . (e) the purchase or lease or agreement to purchase or lease supplies or fixtures necessary to enter into the business or to continue the business under the franchise agreement at their fair market or rental value . . .

Columbia never alleged that its purchases or rentals from American were at any price other than the bona fide wholesale price. Thus, Columbia plainly had not paid a franchise fee within the meaning of the statute, and could not gain the protection of the FIPA. There is no holding in *American Oil* that service stations are exempt from the FIPA regardless of the payment of a franchise fee.

Mobil argues that a footnote in *American Oil* compels a different conclusion. In that footnote, the court stated:

> Of particular interest is the fact that S.B. 2313, presently pending before the legislature of the State of Washington, would amend the Franchise Investment Protection Act to apply to agreements granting service station dealers the right to sell gasoline under the supplier's trademark. This proposed legislation reinforces our view that the franchise act, as presently enacted, does not apply to jobber sales contracts between oil companies and private corporations.

88 Wash.2d at 841 n. 4, 567 P.2d at 641 n. 4.

We have examined that proposed legislation, as well as an earlier bill to the same effect, S. 2145, 44th Reg.Sess. (Wash.1975), and neither bill supports the conclusion that the unamended statute has a service station exemption. Rather, each bill would include service stations within the FIPA's coverage regardless of whether a franchise fee was paid to the franchisor. The footnote is thus support for the proposition that service station operators making bona fide purchases from oil companies cannot claim protection under the FIPA unless they have paid a franchise fee.

B. *Franchise Fee*

This brings us to the question of whether Blanton and Healey have presented substantial evidence that they paid Mobil a franchise fee. The FIPA first defines "franchise fee" generally, and then enumerates exceptions. The general definition is:

> "Franchise fee" means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, but not limited to, the payment either in lump sum or by installments of an initial capital investment fee, any fee or charges based upon a percentage of gross or net sales whether or not referred to as royalty fees, *any payment for the mandatory purchase of goods or services* or any payment for goods or services available only from the franchisor, or any training fees or training school fees or charges
> . . . .

Wash.Rev.Code § 19.100.010(11) (emphasis added). Blanton and Healey argue that their mandatory purchases of tied motor oil and TBA & S come squarely within the statutory language. Furthermore, the tied purchases are not excepted from the general definition as purchases at a bona fide retail or wholesale price, *id.* § 19.100.010(11)(a)-(b), (d)-(e), because the purchase price involved overcharges as part of the effects of the tying agreement.

We agree that Blanton and Healey have presented substantial evidence that they have paid a franchise fee. The concept of mandatory purchase is implicit in the concept of an illegal tying arrangement under the antitrust laws. It is irrelevant that a forced overcharge is not specifically denominated a franchise fee. Professor Chisum, in his

exhaustive analysis of the FIPA, states that the FIPA is intended to reach "franchisors who might attempt to extract a hidden fee in the form of overcharges for property sold to the franchisee." Chisum, *State Regulation of Franchising: The Washington Experience,* 48 Wash.L.Rev. 291, 343 (1973). Washington decisional law is in accord with Professor Chisum, one court holding that the term "franchise fee" includes "fees hidden in the franchisor's charges for goods or services." *Lobdell v. Sugar 'N Spice, Inc.,* 33 Wash.App. 881, 892, 658 P.2d 1267, 1278 (1983). Since Blanton and Healey presented substantial evidence that they paid a franchise fee, the directed verdict in favor of Mobil on the FIPA claim must be reversed.

V

CONCLUSION

The antitrust judgments in favor of Blanton and Healey are AFFIRMED.

The contract/fraud judgments in favor of Blanton and Healey are REVERSED and REMANDED for further consideration of mitigated damages.

The FIPA directed verdict in favor of Mobil is REVERSED and REMANDED for further proceedings consistent with that Act.

Blanton and Healey are entitled to reasonable attorney's fees for the antitrust portion of this appeal. Upon presentation of appropriate documentation, this court will determine such fees.

Parties shall bear their own costs on this appeal.

Appendix B

Mobil Oil Corporation is a wholly owned subsidiary of Mobil Corporation which is publicly held. Listed below are the affiliates and subsidiaries of Mobil Corporation, Mobil Oil Corporation, and their affiliates and subsidiaries which are or may be publicly held. For purposes of this list only companies in which a five percent (5%) or greater interest is held are considered.

NAME OF COMPANY

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (Blasbjerg) Limited
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.

Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn GmbH
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Braamkey Investments (Proprietary) Limited
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.

Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Celulosa y Papel de Colombia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers—C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania Colombiana De Forestacion S. A.
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructura Calla 67, Limitada
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP

Corrugadora de Carton, S. A.
C.R.C. Lyon Chauffage
CRCP
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
Dearborn Land Company
De. Ba.—Industria Petrolifero
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
East Texas Salt Water Disposal Company
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG

Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Establissments Bouthenet
Establissements Nicol and Cie
Ets. La Goff
Ets. R. Saillard
Etablissements Wagner
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.
Felix Oil Company
Fibil, S.A.
Fibras Internacionales de Puerto Rico, Inc.
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
First Eastleigh No. 163 (Proprietary) Limited
Fountain Garage (East Park) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin

Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
H. van der Heijden Service Stations B.V.
Heizoal-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Inmunizadoras Unidas, S. A.
Industria De Carbon Del Valle Cauca, S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K. D. Keysers Investments (Proprietary) Limited
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kygnus Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha

Keihin Kygnus Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Loba Chemie Gesellschaft mbh
Lubricantes del Sur, S.A.
Marceaux & Cie
Mateo Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. (Mobil Chimie Belge S.A.)
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire

Mobil Oil Dahomey
Mobil Oil de Mexico, Sociedad Anonima
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings, S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobilrex
Mobil Tunisie
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.

New Zealand Synthetic Fuels (Housing) Corporation Limited
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited

Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe Line Banal de La Goulette
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Prespak (Proprietary) Limited
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S. A. Ets. George DUBOIS
S. A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited

Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)
Societe Alfred Ott & Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers

Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanie (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (REM)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Etablissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-European
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Jean Roussel S. A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers

Societe Nationale de Raffinage (Sonara)
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Regionale de Produits Energetiques
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.

Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse-Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Walton, Gatwick Pipeline Company Limited
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
WSG, Warmeservice Gmbh
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

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JUN 25 1984
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CLERK

No. 83-1896

IN THE

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION,
Petitioner,

vs.

JERRY A. BLANTON, ROY H. HEALEY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the jury was instructed and the verdict was rendered under standards which are applied to attempted monopolization in all federal circuits, does the Ninth Circuit's reference on appeal to the *Lessig* presumption provide an appropriate basis for certiorari?

2. Where the jury verdict as to attempted monopolization under § 2 of the Sherman Act is supported by unchallenged findings of violations of § 1 of the Sherman Act, would a grant of certiorari have any significant effect on the outcome of this case?

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Abbreviations

C.R.	Clerk's Record
Tr.	Transcript of trial
T.Ex.	Trial Exhibit
A-	Appendix to Mobil's Petition for Certiorari
a-	Appendix to Respondent's Brief in Opposition to Petition for Certiorari

No. 83-1896
IN THE

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION,
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vs.

JERRY A. BLANTON, ROY H. HEALEY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Mobil's Statement of the Case Overlooks a Fundamental Point: The Case Was Tried, and the Jury Verdict Rendered, Under the Standards Applied in All Circuits to Claims of Attempted Monopolization.

1. Mobil Asserts Legal Error, But Concedes That The Jury Instructions Were Proper.

Mobil's petition argues that substantial legal error was committed. For that reason, plaintiffs Blanton and Healey reprint here the relevant text of three jury instructions given in this case, to demonstrate that the standards Mobil seems

to assert should have been applied were in fact applied at trial. The jury was instructed that the following legal standards had to be met with regard to monopoly power, market definition, and attempted monopolization:

> . . . Monopoly power does not require 100% control of the market; nor does it necessarily require 50%, or any other given percentage. The test is not numerical; it is a practical test. Monopoly power is the power to control prices or exclude competition in a given market. In some cases there is a legal monopoly--such as in the case of a patent, copyright or trademark. What we are concerned with here is illegal monopolization, that is to say, monopoly power which has either been deliberately or purposefully obtained or maintained.
>
> . . .

C.R. 268, No. 28.

> Now, when a plaintiff proves monopolization of a market, that plaintiff must also provide proof by a preponderance of evidence that there is market or submarket which has been monopolized. You cannot have monopoly power in a vacuum. It must be monopoly power within a given geographic market or submarket and product market, or submarket. In order to determine what constitutes a market or submarket, it must first be determined what is the "area of effective competition," or the area to which one can turn for substitutes.
>
> . . .
>
> . . . As in the other instructions, there is no exact formula for you to apply: you must determine, by all the evidence, whether the markets and submarkets as alleged by plaintiffs are sufficiently distinct in commercial reality.
>
> . . .
>
> At all times, the question remains whether the area of competition identified by such factors is economically significant in terms of deciding what firms or products act as real and practical constraints on Mobil's power over prices or competition.

C.R. 268, No. 29 (reprinted in full in appendix to this brief; a-1 to a-2).

> In addition to monopolization, plaintiffs have alleged that defendant has attempted to monopolize trade. An attempt to monopolize has three elements: (1) specific intent to monopolize; (2) some act or acts done in furtherance of an intent to monopolize; and (3) which although insufficient to actually produce monopoly power creates a dangerous probability that the defendant will achieve a monopoly of the relevant market.

C.R. 268, No. 30 (reprinted in full in appendix to this brief; a-2 to a-3).

Mobil's petition is centered on attempted monopolization, but concedes that the attempted monopolization instruction given by the trial court is the very instruction which is compelled by the decisions of this Court. Petition, at 4-5. Indeed, Mobil has asserted no error and no conflict between the circuits as to the three jury instructions on monopolization, attempted monopolization or market definition.

2. Evidence Was Presented at Trial of Substantial Restraints of Trade at the Wholesale Level.

Although Mobil poses its issues in the form of a legal argument, the heart of its petition is found in what are essentially evidentiary arguments as to a purported failure of proof or as to an "impossible" case on market, dangerous probability, or impact on competition. Plaintiffs Blanton and Healey therefore provide this summary of the principal evidence adduced at trial, to demonstrate that any assertion as to failure of proof is not well-founded.

This case was filed by plaintiffs Blanton and Healey, who were independent operators of service stations. Mobil's Dealer Relations Policy states:

> The company has chosen to market a major portion of its automotive products through retail outlets operated by independent businessmen.

T. Ex. 304, at 1. Plaintiffs, like the other independent dealers Mobil dealt with, were not employees of Mobil. Although the Mobil name and logo were prominently placed, the dealers' stations were not company-operated outlets for Mobil Oil Corporation. Mobil provided plaintiffs and other independent dealers with a lease, supplied motor fuel to them, and promised them that they were free to be independent businessmen, to purchase freely from any source and to sell freely to any customer. As a result, it was understood that Mobil was to be in competition with other suppliers of oil, lubricants and "TBA&S" (tires, batteries, accessories and specialty items) in sales to such dealers. Tr. 1579-80 & 1957.

Plaintiffs contended that, despite these promises, Mobil tried to eliminate any competitive supplier from selling to these independent dealers, and in turn to prevent these dealers from reselling any non-Mobil products they did buy, thereby violating § 2 of the Sherman Act, 15 U.S.C. § 2. In connection with that proof, plaintiffs presented evidence of *per se* violations of § 1 of the Sherman Act, 15 U.S.C. § 1, such as tying, group boycott, and resale price maintenance, as well as other acts designed to enhance those restraints. At the trial there were twenty-two witnesses, more than 2000 pages of testimony, and more than 400 exhibits. This evidence demonstrated that dealers were told, for example, that if they bought from Delco they should have Delco paint their stations; that if they bought from Texaco it would be the last oil they would ever buy; and that if they bought from Time Oil they could jeopardize their leases. Tr. 114, 130, 619. Further, when plaintif Blanton tried to sell large volumes of automotive products to other dealers, Mobil threatened the dealers and coerced a boycott. Tr. 589-90, 862-63. After Blanton refused to buy an order of Mobil tires, Mobil

employees started to jackhammer his concrete pump pads. Tr. 142-43. After Healey refused a tire order, his rent was increased. Tr. 1283-84. Blanton ultimately lost his station. T.Ex. 258-59. He was then hired by plaintiff Healey who in turn lost his station. T.Ex. 143.

Based on such evidence and other evidence discussed in the Ninth Circuit opinion, *Blanton v. Mobil Oil Corporation*, 721 F.2d 1207 (9th Cir. 1983); Appendix to Mobil Petition, A-1*, the jury rendered verdicts in favor of plaintiffs on tying, group boycott, resale price maintenance, and attempted monopolization, in addition to its verdicts on various state law claims. Mobil does not challenge the verdicts as to predatory acts and *per se* violations of § 1 of the Sherman Act. Mobil centers its Petition on the market definition element of attempted monopolization under § 2 of the Sherman Act, even though it has not challenged plaintiffs' evidence of market.

3. Evidence Was Presented of Market and of Lack of Cross-Elasticity of Demand.

Plaintiffs presented evidence to prove that wholesale distribution and sales of oil, lubricants and TBA&S to dealers involved, and were recognized in the industry as involving, separate submarkets. For example, the evidence included: Mobil's admissions that it did not consider other oil companies to be its competition in sales to its own dealers, Tr. 2002; Mobil's own statement that it would not give

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* All references to the Ninth Circuit's opinion in this case will be made by parallel citation to the federal reporter, and to the pages of the opinion as reprinted in the Appendix to Mobil's petition.

dealers the same low price that it gave to retail outlets such as Safeway because it considered retail service station dealers to be in a separate market, described as a different "class of trade", Tr. 125 & 864; Mobil's distributor stating that sales to dealers of different brands were handled by the industry as separate and distinct markets, Tr. 1486-89; proof that Mobil could exclude and had excluded competition such as Texaco, Delco, Time Oil, and plaintiff Blanton, Tr. 114, 130-31, 589-90, 619, 863-64.

This Court has previously ruled that when a slight decrease in price causes "a considerable number of customers . . . to switch," such evidence indicates that there is a high cross-elasticity of demand and therefore would be proof "that the products compete in the same market." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956). In this case, plaintiffs presented evidence to show that despite substantial price differences, there was no significant switch by dealers or other change in wholesale purchasing patterns. For example, this included evidence (a) that Mobil made wholesale sales of Mobil products to dealers at prices as much as 20 to 25% higher than dealers could buy the same or comparable products at retail from outlets such as Safeway, Tr. 132, 895 & 1270, (b) that Mobil refused to drop its prices to dealers in response to competitive price requests, Tr. 1794, but (c) that despite this pricing 80% or more of the "independent" dealers still bought from Mobil on any given promotion, T.Ex. 145.

Such evidence as to lack of cross-elasticity of demand fits the requirements of *du Pont*, *supra*. In sum, evidence was presented at trial to show that in fact wholesale sales of TBA&S products occurred in distinct and identifiable

submarkets in economic reality, with no significant price sensitivity to other submarkets.

As a result, this case raised an evidentiary question only, which was for the jury to decide, inasmuch as the jury instructions were conceded to be correct and market definition is a factual issue. The weighing of evidence is not an appropriate issue for certiorari.

4. Mobil's Petition Raises a Narrow Issue Which Had No Effect on the Trial and Which Is of No General Public Significance.

Because it has not challenged the jury instructions, Mobil's claim of legal error as to attempted monopolization is necessarily very limited. It is even further limited because market definition is a factual issue, and on appeal to the Ninth Circuit, Mobil did not challenge the factual basis for the jury's market finding:

> . . .Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding. . . .

721 F.2d at 1213; A-11.

Mobil had contended on appeal simply that the market definition found by the jury could be disposed of as a matter of law, and without reference to the record. The Ninth Circuit ruled that market definition is a question of fact, and that the jury's finding is not to be disturbed unless clearly erroneous. *Id.* It then rejected Mobil's legal argument by referring to *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). On certiorari, Mobil contests only that reference to *Lessig*, which the Ninth Circuit had used to reject Mobil's argument that the jury's factual finding could be dismissed as a matter of law.

The issue raised by Mobil on certiorari, then, is not a question of how the case was tried, the jury instructed, or the verdict rendered, or even whether the evidence was sufficient, but is simply a question of how the Ninth Circuit drafted its opinion. The *Lessig* reference in that opinion is not essential to the judgment entered in this case. Mobil's petition therefore does not raise any issue of substantial importance to the result in this case, or to the parties, let alone on the broader basis required by Sup. Ct. R. 17.

ARGUMENT

A. Summary of the Argument

Just as it sought to do on appeal to the Ninth Circuit, Mobil is seeking on certiorari to create a legal issue from a factual case which was submitted to the jury under admittedly correct instructions. Although the *Lessig* presumption has been criticized by other Circuits, *see Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3rd Cir.), *cert. denied*, 419 U.S. 869 (1975), this case is not an appropriate one for this Court to address such an issue. Because Mobil has not challenged the instructions to the jury or the sufficiency of the record to support the jury's verdict, review by this Court of the Ninth Circuit's reference to *Lessig* would have no necessary effect on the outcome of this case.

The jury's attempted monopolization verdict in this case was consistent with the record, the three elements applied in all Circuits, and the purpose of the antitrust laws. In all Circuits including the Ninth it is recognized that attempted monopolization has three elements: intent, act and dangerous probability. The jury was so instructed in this case, and so found. The *Lessig* presumption permits an inference to be drawn as to the third element, but only in the limited

situation where a plaintiff has presented substantial evidence of a *per se* violation or other significant restraint of trade.

In any case, the jury here was not instructed as to the *Lessig* presumption, and made no use of it. Therefore, the purported "conflict" between the Circuits, which does not involve a conflict as to the three basic elements of attempted monopolization, does not involve anything that affected the trial or fact-finding process in this case.

Mobil's Petition is not well-founded because of one additional reason. Mobil has misread the record in its attempt to create an issue for appeal and for certiorari.

B. Mobil's Petition Is Based Upon Erroneous Assertions.

In its petition, Mobil seeks review based upon a series of assertions that are contrary to the record, each of which is addressed in turn.

1. Mobil Erroneously Asserts that this Case Involves a "Single Brand".

Mobil attempts to make it appear that this case raises the issue of a single manufacturer's sales of its own products. Earlier, Mobil had asserted on appeal that the submarket involved a verdict of only "Mobil-branded and Mobil-brokered" products. The Ninth Circuit stated that it "admit[ted] to some puzzlement over Mobil's persistent mischaracterization of the jury verdict," 721 F.2d at 1213 n. 4; A-10, because the jury had in fact found by special verdict form that Mobil's conduct constituted an attempt to monopolize sales of "Mobil-branded and non-Mobil-branded" products to Mobil dealers. On its face, the jury verdict form includes sales by suppliers other than Mobil.

In its petition for certiorari, Mobil continues to assert that the issue is sales "by a single manufacturer-distributor," Petition at 10, even though the trial court had declined to give any jury instruction containing a limitation as to the identity of the supplier. 721 F.2d at 1213 n. 4; A-10. What is critical are the legal standards actually given to the jury. Mobil's arguments on certiorari must address an error actually occurring below, not some purported error that Mobil wishes had occurred.

2. *Mobil Erroneously Asserts that the Relevant Market Is Sales to Consumers.*

Mobil argues in its Petition that the issue involves products which are fungible to the ultimate retail consumer, Petition at 6, and it makes only passing reference to the fact that the market involved sales to dealers by suppliers, not by dealers to consumers. An argument that certain products might be physically similar or otherwise considered interchangeable by ultimate consumers on resale, proves nothing as to cross-elasticity of demand or the existence of economic barriers at the *wholesale* level. Mobil's Petition largely attempts to avoid the fact that at trial it had asserted that the overall product market was sales *to dealers*, which occur at the wholesale level, rather than to consumers at retail:

> Mobil contends that it must compete with other sellers of oil, tires, batteries and accessory items, such as Valvoline, Havoline, Firestone and Goodyear, *and that the product market is the sales of any type or brands of TBA&S, oil and lubricants to any type of service station dealer*, Mobil, Texaco, Union, Shell or any other dealer.

C.R. 268, No. 29 (emphasis added); a-2.

Mobil cannot now be heard to argue, contrary to the law of this case and the record, that fungibility to the consumer at retail is the issue, rather than to the dealer at wholesale.

3. *Mobil Erroneously Asserts a Lack of Evidence.*

Mobil's petition asserts that there was no "showing of dangerous probability," Petition at i, and no proof of "detrimental impact on competition." *Id.* at i-ii. Mobil also makes bald assertions such as its claim that its oil and TBA&S are not so dominant as to destroy competition, Petition at 7, but refers to no supporting evidence. Mobil then tries to avoid the evidentiary issues it has raised, and portray the issue as one of law. Mobil claims that the verdict was for "attempted monopoly of a market which could not, as a matter of law, constitute a relevant market for antitrust purposes," *Id.* at 1, and that the case involves a legal impossibility, or an attempt to do "that which, if accomplished, would not violate the antitrust laws." *Id.* at 8. Despite those claims, the record contains substantial evidence that Mobil intentionally excluded competitors from a submarket that had become distinct in commercial reality.

Mobil's avoidance of the evidence is contrary to this Court's directive that in antitrust cases

> [the legal] guidelines [for analysis of markets] offer no precise formula for judgment and *they necessitate, rather than avoid, careful consideration based on the entire record.*

United States v. Continental Can Co., 378 U.S. 441, 449 (1964) (emphasis added). Moreover, factual findings as to market are not to be overturned unless "clearly erroneous." *International Boxing Club v. United States*, 358 U.S. 242, 244-245 (1959). Mobil must address the factual record if it is to challenge market definition, but it has not done so.

This Court further explained in the case of *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), that submarkets may be defined by examining

> such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

In its petition, Mobil indirectly concedes this point when it asserts that the question of market definition cannot be judged "in a vacuum," citing *M.A.P. Oil Co. v. Texaco*, 691 F.2d 1303 (9th Cir. 1982); Petition at 20. The jury was explicitly so instructed in this case:

> . . . You cannot have monopoly power in a vacuum. It must be monopoly power within a given geographic market or submarket and product market, or submarket . . . .

C.R. 268, No. 29; a-1. Despite its own admission that market cannot be judged in a vacuum, and this Court's direction in *Continental Can* that market decisions necessitate careful consideration of the record, Mobil itself fails to address the factual record as to market. Having lost on a factual issue, Mobil has sought to transmute it into a legal issue. That it cannot do.

(a) Plaintiffs' Evidence of Dangerous Probability

Mobil argues that certiorari should be granted because the element of "dangerous probability" was purportedly disregarded. In fact, the jury was instructed as to all three elements sought by Mobil, including dangerous probability of achieving monopoly. C.R. 268, No. 30; a-2. That instruction does not conflict with any other Circuit.

Monopoly power is the power either to set prices or to exclude competition. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). The jury was so instructed. C.R. 268, No. 28. A dangerous probability of monopoly power therefore by definition means a dangerous probability of the power either to set prices or to exclude competition. As has been

summarized above, plaintiffs presented substantial evidence that Mobil already had substantial power to do *both*: to set prices without regard to alternative sources *and* to exclude competition, and that it exercised that power. That evidence has not been disputed by Mobil on appeal or on certiorari. 721 F.2d at 1213; A-11.

(b) Plaintiff's Evidence of Impact on Competition.

In its Statement of Issues, Mobil asserts that there was no showing that defendant's conduct had a detrimental impact on competition. Issue No. 2. Predatory activity, in particular such Mobil violations as tying, group boycotts, and resale price maintenance, are classified as *per se* violations precisely because of their "pernicious effect on competition." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). For Mobil to argue otherwise is to grasp at straws.

Mobil does ultimately concede, Petition at 17, that *per se* violations involve injury to competition. However, Mobil then tries to insert arguments on the dollar amount of damages in order to support its claim that there was no proof of the fact of damage in this case. In its petition for certiorari, Mobil did not list any issue concerning plaintiffs' damages or their measurement. Mobil's arguments, Petition at 4, 5 & 17, as to the amount of damages, should therefore be stricken from any consideration on certiorari.*

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* However, in order to set the record straight, and to demonstrate that plaintiffs do not waive any right to contest Mobil's assertions as to damages, plaintiffs set forth the following corrections.

Mobil makes cryptic references in its brief to the jury's purported "finding" of "0" damages for certain individual antitrust offenses. In so doing, Mobil omits to tell this Court that at Mobil's own request, C.R. 248, No. 93, the jury had been instructed that a plaintiff could not recover

In any case, plaintiffs' evidence of effect on competition is not limited to the undisputed *per se* violations, but also includes evidence discussed above that Mobil could and did set prices *and* exclude competitors from selling in a submarket which had become distinct in commercial reality, as a result of which the public could not benefit from the competition that those dealers could have provided if they had been free to purchase non-Mobil products.

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twice for the same injury, C.R. 268, No. 39. The jury then rendered verdicts finding a series of *per se* violations which it specified to be part of Mobil's attempted monopolization, and awarded damages once under attempted monopolization; it did not award an additional or duplicative award under the individual *per se* offenses. C.R. 273. For those individual included offenses, the jury simply inserted "0," and stated that damages for those specific *per se* violations were included within the attempted monopolization verdict. *Id.* The Ninth Circuit closely examined the jury instructions and interrogatories, ruling that the jury's actions were "not only reconcilable, but sensible." 721 F.2d at 1213; A-10.

Mobil also asserts on certiorari that plaintiffs' § 2 damages "far exceed" plaintiffs' § 1 damages. Petition at 17. Mobil omits to state that on appeal it had argued, as the Ninth Circuit noted, that plaintiffs' § 1 damages were "exactly the same" as its § 2 damages. 721 F.2d at 1213; A-9. Mobil now argues that tying and price-fixing damages were not the same as attempted monopolization damages. Petition at 17, ignoring such evidence as the substantial losses caused by group boycott. T.Ex. 296 & 297 (as much as $250,000 in additional TBA&S gross profits after Blanton started another station). In any case, the Ninth Circuit ruled, further, that plaintiffs had presented "more than sufficient evidence to support the jury's finding of causal antitrust liability," together with "substantial evidence of losses caused by concrete acts of Mobil . . . [as well as] 'before and after' evidence, comparing a plaintiff's restrained business with a comparable business operating free of antitrust restraints . . . [which evidence was] sufficient to justify the amount of antitrust damages awarded by the jury." 721 F.2d, at 1215-16; A-14 to A-17.

Despite its arguments on the topic, Mobil has listed no issue regarding damages. Even had Mobil attempted to pose any issue on damages, factual arguments as to the amount of a damage award could be made in every case, and do not constitute a sufficient or reasonable basis for a grant of certiorari.

C. This Case Rests On Factual Issues And Is Not Appropriate for Certiorari.

1. The Lessig Presumption Is Not Essential, And Is Not the "Sole" Basis for the Decision Below.

Mobil asserts that the Ninth Circuit had sustained the jury verdict "solely" on the basis of *Lessig*. Petition at 1. Mobil attempts to portray the Ninth Circuit's ruling as one in which that court had agreed that the market definition was faulty and the market evidence insufficient. In its statement of the case, Mobil asserts

> The Ninth Circuit did not dispute that the market upon which the jury had based its verdict had no relevance under the Sherman Act. The panel . . . simply declared relevant market irrelevant . . .

Petition at 5.

The Ninth Circuit did not rest its affirmance "solely" on *Lessig*, nor did it imply that plaintiffs' evidence on market definition was insufficient. The Ninth Circuit engaged in an extensive analysis of the record. It commenced by carefully reviewing the evidence as to the *per se* offenses (tying, group boycott and resale price maintenance), 721 F.2d at 1210-12, A-3 to A-9; causation and measurement of antitrust damages, *Id.* at 1215-16, A-14 to A-17; evidence of price insensitivity, *Id.* at 1211, A-4; and evidence of exclusion of competition, *Id.* at 1211-12, A-4 to A-7. The Ninth Circuit held, in accordance with all the federal Circuits, that market definition is a factual issue, and specifically noted Mobil's failure to present any basis to contradict the jury's factual finding:

> . . .Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding. . . .

721 F.2d at 1213; A-11.

The Ninth Circuit had already stated, again in accordance with all Circuits, that a market finding cannot be set aside unless clearly erroneous. 721 F.2d at 1213; A-10. *See also. International Boxing Box Club v. United States*, 358 U.S. 242, 244-45 (1959). Because Mobil had presented no basis for setting aside the factual decision, the Ninth Circuit's decision was sufficient at that point. However, Mobil had claimed that, regardless of the evidence of market, the Court should rule as a matter of law against the market definition found by the jury. The Ninth Circuit declined to reach that additional and novel legal issue posed by Mobil. In order to do so, the Ninth Circuit cited *Lessig* in stating that "We need not resolve the legal question presented by Mobil because it is clear that the jury's attempted monopolization finding may be sustained under *Lessig* . . ." 721 F.2d at 1213; A-11.

2. This Case Presents Factual Issues and No Significant Conflict Between the Circuits.

The Ninth Circuit justified its choice not to reach Mobil's novel legal argument by relying on *Lessig's* statement that under attempted monopolization the relevant market is "not in issue," citing *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 n. 23 (1956). Mobil would therefore have this Court believe that the Ninth Circuit therefore does not consider market definition at all in attempt cases. Again, Mobil has overstated its argument. The Ninth Circuit ruled

> Despite the sweeping language of *Lessig*, however, it is clear that we do require a showing of relevant market in circumstances where conduct of the attempted monopolizer is ambiguous or not clearly predatory.

721 F.2d at 1214; A-11.

Further, Mobil omits to address the limitations the Ninth

Circuit has in recent years placed on *Lessig*. *See e.g., Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925-926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). As the Ninth Circuit stated in *Hunt-Wesson*, and in the instant case, proof of market power is required under *Lessig* when the claim is that a seller used its dominant position in the market to attempt to monopolize; proof of market power only may be disposed of when the seller has engaged in predatory conduct or *per se* violations specifically intended to exclude competition. *Id.* The *Lessig* rule does not apply unless the conduct is *clearly* predatory, that is, unless an injury to competition is proved. Where injury to competition has not been proved by clearly predatory conduct, under *Lessig* a plaintiff must still prove separately that there has been a dangerous probability that the alleged intentional anticompetitive conduct did have a substantial probability of succeeding to monopolize the relevant market, and thereby of injuring competition.

As applied, therefore, the *Lessig* rule does not do away with the requirement of showing injury to competition. Nor does it conflict with the interpretation of the Sherman Act in the early years after the law was passed. In the seminal case of *Standard Oil Company of New Jersey, et al. v. United States*, 221 U.S. 1 (1911), in which the Supreme Court established the "rule of reason" for § 1 offenses, the Court also analyzed § 2. The Court ruled that the Act's purpose "was to prevent undue restraints of every kind or nature . . . [and that the Act] indicates a consciousness that the freedom of the individual right to contract . . . was the most efficient means for the prevention of monopoly . . ." *Id.* at 62. Plaintiffs' case here involves Mobil's restrictions on independent dealers' rights to contract freely for purchases and sales.

The Court in *Standard Oil* also ruled that § 2

> seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade . . .

Id. at 61. Plaintiffs' case here involves just such a series of § 1 violations. The Court in *Standard Oil* concluded that the Sherman Act was in keeping with the trend in the common law to cover "new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning." *Id.* at 57-58.

Thus, *Lessig* is neither illogical nor unsound, nor in this case has it resulted in a verdict contrary to this Court's decisions. Specific intent to do the wrong was described as significant by this Court in *Standard Oil*. *Id.* *Lessig* is in accord, for it sets up an inference which comes into play only when specific intent has been proved by proof of predatory acts.

The *Lessig* inference is used in a limited situation where there has been a showing of predatory acts or intent. As a result of that inference, market is not automatically placed at issue. Mobil could have presented evidence to rebut the inference, or to counter plaintiffs' substantial evidence of market, but it did not do so. In any case, the *Lessig* reference in the Ninth Circuit was used only after the Court had reviewed plaintiffs' evidence and found that Mobil had left it unchallenged, and then only to reject Mobil's argument that the market definition found by the jury could be ruled on as a matter of law, and without regard to the record.

The jury in this case did not use the *Lessig* presumption, and Mobil has not challenged the evidence supporting their decision. *Lessig* was used here only to dispose of Mobil's

assertion that plaintiffs' market was a legal impossibility. Such a use of *Lessig* does not provide an issue of such significance that certiorari should be granted.

3. Even Under Mobil's Arguments, Reversal of Section 2 Verdict Would Have No Effect.

A grant of certiorari would have no necessary effect on the result of this case, even were *Lessig* ultimately to be overturned. As the Ninth Circuit stated, "[T]he damages awarded for 'attempted monopoly' [under Section 2 of the Sherman Act] were, in Mobil's terms, 'exactly the same' as the damages suffered by plaintiffs from all the component antitrust violations [under Section 1 of the Sherman Act]." 721 F.2d at 1213; A-9. Therefore, even were there some error in the Section 2 verdict, the logical result of Mobil's position is that a reversal of *Lessig* would have no impact on the outcome of this case under Section 1.

CONCLUSION

A writ of certiorari is discretionary, and will be granted only where there are special and important reasons therefor. *Fay v. Noia*, 372 U.S. 391, 436 (1963). Certiorari is to be granted involving principles the settlement of which is important to the public. *Rice v. Sioux City Memorial Park Cemetery, Inc. et al.*, 349 U.S. 70, 79 (1955).

In this case, there is no dispute as to plaintiffs' evidence. There is no dispute that the jury found a series of predatory and *per se* violations of § 1 of the Sherman Act, 15 U.S.C. § 1, as well as attempted monopolization under § 2. 15 U.S.C. § 2. There is no dispute as to the propriety of the jury instructions under which the evidence was submitted. A review

of the Ninth Circuit's reference to *Lessig* in its opinion would have no necessary effect on the result in this case. Certiorari is not appropriate.

Respectfully submitted this
22nd day of June, 1984.

Robert H. Alsdorf*
ARMSTRONG & ALSDORF
Kenneth R. Shear
Attorneys for Respondent

**Counsel of Record*

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERRY A. BLANTON, Plaintiff, vs. MOBIL OIL CORPORATION, Defendant.	)	No. C77-145M
ROY H. HEALEY, Plaintiff, vs. MOBIL OIL CORPORATION, Defendant.	)	No. C77-162M

COURT'S INSTRUCTIONS TO THE JURY

(March 31, 1982)

INSTRUCTION NO. 29

Now, when a plaintiff proves monopolization of a market, that plaintiff must also provide proof by a preponderance of evidence that there is a market or submarket which has been monopolized. You cannot have monopoly power in a vacuum. It must be monopoly power within a given geographic market or submarket and product market, or submarket. In order to determine what constitutes a market or submarket, it must first be determined what is the "area of effective competition," or the area to which one can turn for substitutes.

Plaintiffs contend that the geographic market is Western Washington. Plaintiffs also contend that the product market is TBA&S, oil and lubricant sales to dealers, and that the product submarket is Mobil-branded and non-Mobil branded TBA&S, oil and lubricant sales to Mobil dealers. Mobil contends that it must compete with other sellers of oil, tires, batteries and accessory items, such as Valvoline, Havoline, Firestone and Goodyear and that the product market is the sales of any type or brands of TBA&S, oil and lubricants to any type of service station dealer, Mobil, Texaco, Union, Shell or any other dealer. As in the other instructions, there is no exact formula for you to apply: you must determine, by all the evidence, whether the markets and submarkets as alleged by plaintiffs are sufficiently distinct in commercial reality. To make this decision you must decide whether the distribution of Mobil-branded and Mobil brokered TBA&S, oil and lubes to its dealers in Western Washington, or any other product and geographic market, was treated by Mobil and by others as a distinct market; whether it was relatively immune from competition or substitutes, or whether it was acquired by means that show attempt to monopolize. In general, well-defined submarkets may exist which, in themselves, constitute relevant product markets for antitrust purposes.

At all times, the question remains whether the area of competition identified by such factors is economically significant in terms of deciding what firms or products act as real and practical constraints on Mobil's power over prices or competition.

INSTRUCTION NO. 30

In addition to monopolization, plaintiffs have alleged that defendant has attempted to monopolize trade. An attempt to monopolize has three elements: (1) specific intent to monopolize; (2) some act or acts done in furtherance of an intent to monopolize; and (3) which although insufficient to actually produce monopoly power creates a dangerous probability that the defendant will achieve a monopoly of the relevant market.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's itent [sic] from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

Office - Supreme Court, U.S.
FILED
JUL 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1896

IN THE

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION,

Petitioner,

vs.

JERRY A. BLANTON, ROY H. HEALEY,

Respondents.

REPLY OF MOBIL OIL CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 83-1896

IN THE

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION,

Petitioner,

vs.

JERRY A. BLANTON, ROY H. HEALEY,

Respondents.

REPLY OF MOBIL OIL CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the words of this Court, *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964) should be overruled to "eliminate treble damages from private state court suits masquerading as antitrust actions." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. ___, 52 U.S.L.W. 4821, 4828 (June 19, 1984). In striking down the doctrine of intracorporate conspiracy as an offending masquerader, this Court in *Copperweld* re-emphasized a fundamental premise of federal antitrust law:

> "'... antitrust laws ... were enacted for "the protection of *competition* not *competitors*."' *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ... (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))."
>
> 52 U.S.L.W. at 4825, n. 14.

This fundamental limitation on federal antitrust laws was central to Mobil's argument on appeal that as a mat-

ter of law no injury to competition can result from an attempt to monopolize a "relevant" market defined without regard to the functional inter-changeability of products as used by consumers. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 343, 395 (1956). The Ninth Circuit refused to confront this argument choosing instead to hide behind the *Lessig* "mask" which treats relevant market as immaterial in a Section 2 attempted monopoly claim. 327 F.2d at 474.

Having had their attempted monopoly judgment affirmed by the Ninth Circuit on the basis of the *Lessig* rule, Respondents' opposition attempts to disclaim the importance and vitality of that anomalous rule. While this eagerness to abjure the *Lessig* incantation outside of its Ninth Circuit confines is easily understood, if *Lessig* falls, the Respondents' judgment falls with it.

Respondents cannot, however, disguise the simple fact that, relying on *Lessig*, the Ninth Circuit refused to consider Mobil's argument that sales of fungible automotive products to Mobil dealers is not a relevant market. This conclusion is compelled under principles enunciated by this Court in *United States v. E. I. du Pont de Nemours & Co., supra*, as well as the relevant market authorities of the Ninth Circuit itself. *See e.g., JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1016 (9th Cir. 1983); *cert. denied*, ____ U.S. ____, 104 S.Ct. 106 (1983).[1] Indeed, every automotive products case which

[1]Contrary to Respondents' assertion and the Ninth Circuit Panel's characterization — 721 F.2d at 1214; Appendix, A-12 — Mobil did not argue that respondents "abandoned" *Lessig* below. Rather, Mobil simply pointed out that it is improper to affirm a judgment on appeal on a theory never presented to the jury at trial. Appellant's Combined Reply Brief and Answering Brief, p. 9; *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

has addressed the Respondents' theory on its merit has rejected it.[2]

Respondents' jury verdict was upheld by the Ninth Circuit because the panel did *not* confront the relevant market issue:

> "We need not resolve the legal question presented by Mobil because it is clear that the jury's attempted monopolization finding may be sustained under *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied* 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed. 2d 1044 (1964), and its progeny."
>
> 721 F.2d at 1213; Appendix to Petition A-11.

This use of *Lessig* is not a mere "reference" nor is it *dicta*. It is the *ratio decidendi* of the affirmance which Respondents argue should remain undisturbed. The Ninth Circuit Panel left no doubt on this point:

> "Although the *Lessig* doctrine has been subject to criticism, it is the law of this circuit, and we are bound to follow it."
>
> 721 F.2d at 1214; Appendix to Petition A-12.

To divert attention from *Lessig*, Respondents argue Mobil erroneously asserts that this case involves a "'Single Brand.'" Respondents' Opposition, p. 9. Respondents' argument cannot obscure that under *du Pont, supra*, as well as the law of all circuits save the *Lessig* exception, sales to Mobil dealers, by Mobil or otherwise,

[2]*Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 118 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974); *South End Oil v. Texaco, Inc.*, 237 F.Supp. 650, 656 (N.D. Ill. 1965); *Metts v. Clark Oil & Refining Corp.*, 1981-1 Trade Cases ¶ 64,148 (Mo. Ct.App. 1981); *Tire Sales Corp. v. Cities Service Oil Co.*, 410 F.Supp. 1222 (N.D. Ill. 1976), *rev'd on other grounds*, 637 F.2d 467 (7th Cir. 1980); *Blackwell v. Power Test Corp.*, 1982-2 Trade Cases ¶ 64,929 (D.N.J. 1982).

is not a relevant market.[3] The functional interchangeability of automotive oils, accessories and supplies precludes another conclusion. The control of sales to only a portion of the relevant market [*i.e.*, Mobil dealers] is not "Monopoly power" — "the power to control prices or exclude competition." *du Pont, supra*, 351 U.S. at 391 (footnote omitted).

Unable to seriously dispute that *Lessig* is law only in the Ninth Circuit, or that it is inconsistent with the interpretation of the Sherman Act Section 2 applied in every circuit in the United States,[4] Respondents suggest that *Lessig* is in accord with the decisions of this Court, and principles enunciated in *Standard Oil Company of New Jersey, et al. v. United States*, 221 U.S. 1 (1911). Respondents' Opposition pp. 16-18. To the contrary, as recently as June of this year, this Court once again emphasized:

> "The conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization."
>
> *Copperweld Corp. v. Independence Tube Corp., supra*, 52 U.S.L.W. at 4825 (footnote omitted).

Lessig as applied by the Ninth Circuit in the instant case for the first time, imposes liability for an "attempt to monopolize" which did not and could not threaten actual monopolization. Respondents' arguments do not address this point. Instead, they argue that the injury to competition which is presumed in Section 1 *per se* violations satisfies the Section 2 requirement of dangerous probability of successful monopolization. Respondents' Opposition p. 17. It does not. Sections 1 and 2 of the Sherman Act are different and distinct:

> "The point remains, however, that purely unilateral conduct is illegal only under §2 and not under §1. Monopolization without conspiracy is unlawful under §2, but restraint of trade without a conspiracy or combination is not unlawful under §1."
>
> *Copperweld, supra*, at 4825, n. 13.

Thus, Respondents' arguments merely point up what Mobil has argued all along: the *Lessig* rule converts Section 1 violations, *without more*, into violations of the Section 2 prohibition of attempted monopoly.

This case, expressly affirmed on the basis of *Lessig*, is the appropriate vehicle to put that inconsistent rule finally to rest. Its demise "will ... not cripple antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions." *Copperweld, supra*, at 4825.

Dated: July 17, 1984

Respectfully submitted,

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[3] *See, e.g., Tire Sales Corp. v. Cities Service Oil Co., supra*: "The relevant market can be defined no narrower than the wholesale market of TBA [Tires, Batteries and Accessories] on the South side of Chicago." 410 F.Supp. at 1230.

[4] Criticism of *Lessig* outside the Ninth Circuit continues, most recently in *American Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350, 1366-67 (Fed. Cir. 1984).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

MOBIL OIL CORPORATION, PETITIONER

v.

JERRY A. BLANTON, ROY H. HEALEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals' erroneous statement that a relevant market finding is not necessary to establish an attempt to monopolize under Section 2 of the Sherman Act warrants this Court's review of the court of appeals' judgment upholding a jury verdict for respondents where the jury found that petitioner had attempted to monopolize a specified relevant market and the court of appeals concluded that petitioner "[h]ad pointed to nothing in the record that would lead [the reviewing court] to question the jury's factual finding."

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1896

MOBIL OIL CORPORATION, PETITIONER

v.

JERRY A. BLANTON, ROY H. HEALEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents Blanton and Healey formerly leased and operated Mobil service stations in the Seattle, Washington area. They sued petitioner Mobil Oil Corp. (Mobil) seeking damages for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. 14.[1] By special verdict, the jury found that Mobil had subjected Blanton and Healey to an

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[1]They also alleged fraud, breach of contract and violation of Washington's Franchise Investment Protection Act (FIPA), Wash. Rev. Code Ann. § 19.86.010 *et seq.* (1978). The district court granted a directed verdict in favor of Mobil on the FIPA claim (Pet. App. A2).

unlawful tying arrangement in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act, and that Mobil had subjected Blanton to coerced resale price maintenance and a group boycott. Pet. App. A2-A6. The jury also found that Mobil had attempted to monopolize "a relevant submarket consisting of sales of 'Mobil-branded and non-Mobil-branded oil, lubricants, and TBA&S [tires, batteries, accessories and specialty items] to Mobil dealers.' " *Id.* at A10.[2] Damages resulting from this attempted monopolization were assessed at $134,585 for Blanton and $19,967 for Healey. *Id.* at A2.[3] The district court trebled the damages upon entry of judgment. E.R. 237-238.

2. Mobil appealed the attempted monopolization award, and the Ninth Circuit affirmed.[4] The court of appeals rejected Mobil's contention that there was reversible error in the jury's relevant submarket finding.[5] The existence of a

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[2]The jury found that there also existed a relevant market "for the sale of any and all oil, lubricants and TBA&S to gasoline station dealers" but that Mobil had not monopolized or attempted to monopolize that market. E.R. 243. "E.R." refers to the Excerpt of Clerk's Record in the court of appeals.

[3]The jury found "$0" damages from the other antitrust violations but it indicated that damages resulting from those violations were included in the attempted monopolization verdict. The jury also found that Blanton had suffered $94,628 and Healey $11,144 in non-antitrust damages. Pet. App. A2.

[4]Mobil also appealed the contract-fraud awards. Blanton and Healey cross-appealed the directed verdict in favor of Mobil on the FIPA claim. The court of appeals reversed and remanded both the contract-fraud and the FIPA judgments (Pet. App. A3, A27). Those issues are not presented in the petition for a writ of certiorari.

[5]Mobil made two other arguments in its antitrust appeal: It argued that the special verdicts with respect to damages were inconsistent, and that Blanton and Healey had failed to prove causal antitrust damages. The court of appeals rejected both these arguments, and Mobil does not raise either of them in this Court.

particular market, the court held, is an issue of fact, and "Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding." Pet. App. A11. Because Mobil had not challenged the sufficiency of the evidence as such, the court concluded that Mobil was "apparently ask[ing the court] to rule as a matter of law that a relevant submarket cannot consist of sales to dealers licensed by a common oil company." *Ibid.* The court declined to resolve this "legal question," however, "because it is clear that the jury's attempted monopolization finding may be sustained under *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 * * * (1964), and its progeny." Pet. App. A11. Under what the court referred to as the "modified *Lessig* doctrine," it stated (*id.* at A12):

> We cannot reverse the jury's finding of attempted monopoly by reason of its definition of the relevant market because the jury's finding of *per se* violations of the Sherman Act makes the relevant market finding unnecessary to establish liability.

DISCUSSION

The court of appeals' discussion of attempted monopolization is inconsistent with the rationale of decisions of this Court and of other courts of appeals. Nonetheless, the United States does not believe that further review is warranted.

There are, to be sure, serious flaws in the court of appeals' opinion. Particularly at odds with established principles are the court's statements that, on the facts of this case, there was no need to define a relevant market before imposing liability under Section 2 (15 U.S.C. 2) and that, under the Ninth Circuit's "*Lessig* rule," a plaintiff may establish attempted monopolization without proving that actual monopolization is the probable result. Moreover, the *Lessig* rule reflects a misunderstanding of the Sherman Act's

"basic distinction between concerted and independent action." *Copperweld Corp.* v. *Independence Tube Corp.*, No. 82-1260 (June 19, 1984), slip op. 12, quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 6.

The case does not, however, merit review at this time. In this case, as in several other Ninth Circuit decisions that cite *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, cert. denied, 377 U.S. 993 (1964), the *Lessig* rule was not the only, or even the primary, basis for decision. Here, the jury was not instructed, and did not find liability, in accordance with *Lessig*; to the contrary, the district court instructed (Br. in Opp. App. a2) that in order for respondents to prevail on their attempted monopolization claim, the jury must find "a dangerous probability that [petitioner] will achieve a monopoly of the relevant market" (*id.* at a3). In response to special interrogatories, the jury found that a specific relevant market existed and that Mobil had attempted to monopolize that market. On appeal Mobil "pointed to nothing in the record that would lead [the court] to question the jury's factual finding" (Pet. App. A11). Accordingly, the court of appeals' judgment could be affirmed on the basis of the findings of fact in which both lower courts concurred.

1. A dangerous probability of successful monopolization of a relevant market is an essential element of the offense of attempted monopolization under Section 2 of the Sherman Act. This Court has specifically stated that "[t]o establish * * * attempt to monopolize * * * it [is] necessary to appraise the exclusionary power * * * in terms of the relevant market." *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). Moreover, the Court noted last Term that "[t]he conduct of a single firm * * * is unlawful only when it threatens actual monopolization" (*Copperweld Corp.* v. *Independence Tube Corp.*, slip op. 12-13). All courts of appeals, other

than the Ninth Circuit, are in accord in holding that proof of dangerous probability of monopolization of a relevant market is required in order to establish an attempt to monopolize.[6]

These holdings reflect the " 'basic distinction between concerted and independent action' " under the Sherman Act. *Copperweld*, slip op. 12, quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, slip op. 6. Concerted action is illegal under Section 1 if it constitutes an unreasonable restraint of trade. But single firm action that creates a similar restraint "is not enough" to establish liability under Section 2, which alone governs single firm conduct. *Copperweld*, slip op. 13. Unless it threatens to create a monopoly, a single firm's conduct does not violate the Sherman Act.

There are sound and "readily appreciated" reasons for this statutory distinction between concerted and unilateral activity, *Copperweld*, slip op. 14:

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the

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[6]See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-275 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068, 1069 (3d Cir. 1978); *White Bag Co.* v. *International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979); *United States* v. *Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981); cert. denied, 455 U.S. 921 (1982); *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 298-299, 302-307 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977); *E.J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296, 306 (10th Cir. 1975), cert. denied, 425 U.S. 907 (1976); *Merit Motors, Inc.* v. *Chrysler Corp.*, 417 F. Supp. 263, 269 (D.D.C. 1976), aff'd on other grounds, 569 F.2d 666 (D.C. Cir. 1977).

> independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Unilateral conduct that does not threaten actual monopolization, on the other hand, is not subject to the Sherman Act "[i]n part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects." *Copperweld,* slip op. 13. Judging unilateral conduct by the standards of Section 2, which focuses on the threat of monopoly power, "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Copperweld,* slip op. 13.

The danger that monopoly power will result from a course of anticompetitive conduct can be meaningfully evaluated only in the context of a relevant market. Market definition is the process of isolating a product (or group of products) and a geographic area within which a firm could charge a price significantly higher than the price that would prevail if there were multiple competing sellers. If a seller "controls" only a product and geographic area that does not constitute a relevant market, however, an increase in that seller's price will simply cause buyers to shift to other substitute products.[7] Such a seller does not "control price" and,

[7]Similarly, manufacturers of other products that consumers do not view as reasonable substitutes may be willing and able to shift to production of the product "controlled" by the seller. Where such shifts

thus, does not have monopoly power. See *United States* v. *duPont & Co.*, 351 U.S. 377, 379 (1956); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).[8]

2. More than 20 years ago, before this Court's decisions in *Walker Process* and *Copperweld,* the Ninth Circuit "reject[ed] the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize." *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 474 (1964). It added that: "When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.' " *Ibid.*

The Ninth Circuit provided no economic justification for these statements. Moreover, the authorities on which *Lessig* relies provide no support for the conclusions the court reached. The opinion in *Lessig* quotes (327 F.2d at 474) a footnote from this Court's opinion in *duPont* (351 U.S. at 395 n.23) for the proposition that market definition is " 'not in issue.' " This Court's comment in that footnote, however, was not directed to the legal proposition the Ninth Circuit adopted. To the contrary, the *duPont* opinion extensively discussed the concept of relevant market as it applied in proving monopolization. The quoted footnote merely described the opinion in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931), and, in so doing, stated factually

can occur relatively quickly (*i.e.*, within 12 months), that manufacturing capacity prevents the exercise of monopoly power and should be included in the relevant market. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 331-333 (1961); U.S. Dep't of Justice, *Merger Guidelines* § 2.21 (June 14, 1984).

[8]Although market share is often the best evidence of the likelihood of successful monopolization, high market share does not always indicate a dangerous probability. Ease of entry into the market, rapidly changing technology, and other conditions may make it inappropriate to infer dangerous probability from market share alone. See, *e.g.*, *White & White, Inc.* v. *American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983).

that in that case "the scope of the market was not in issue." This was not a description or adoption of a legal principle at all, but was merely an accurate recitation of the facts and procedural posture of a particular case.[9] Indeed, this Court's opinion in *Story Parchment* reveals that while the parties did not challenge the market definition in this Court — and hence it was "not in issue" — the case had nonetheless been litigated with the confines of a relevant market in mind. See 282 U.S. at 559 ("This is an action * * * to recover damages resulting from an alleged conspiracy * * * to monopolize interstate trade and commerce in vegetable parchment.").[10]

The second stated source for the *Lessig* rule is equally unavailing to support the Ninth Circuit's conclusion. In *Lessig* the court of appeals (327 F.2d at 474 n.46) read this Court's reference in *Swift & Co.* v. *United States,* 196 U.S. 375, 396 (1905) to "intent and the consequent dangerous probability" as establishing that dangerous probability may be inferred merely from intent. The court of appeals thus placed upon the word "consequent" more weight than its context in *Swift* will bear. Justice Holmes' opinion for the Court in *Swift* states (*ibid.*) that intent is essential to prove an attempt to monopolize and that "[w]here acts are not sufficient in themselves to produce a result which the law

[9]In any event, *Story Parchment* was, as the Court stated in *duPont* (351 U.S. at 395 n.23), "based on proven allegations of combination and conspiracy to monopolize." It was, therefore, a case that involved concerted rather than unilateral conduct.

[10]Moreover, the opinion of the court of appeals in *Story Parchment* shows that while market definition was not a contested issue on appeal, a market had nonetheless been defined. *Paterson Parchment Paper Co.* v. *Story Parchment Co.*, 37 F.2d 537, 538 (1st Cir. 1930), rev'd, 282 U.S. 555 (1931) (three companies "were the only producers in this country of * * * parchment paper, which is used as a protective wrapper for meats, butter, and other foodstuffs" and they "enjoyed a practical monopoly of the trade in this country").

seeks to prevent — for instance, the monopoly — but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee,* 177 Massachusetts 267, 272." The point is simply that intent is an essential element of dangerous probability in this context, as it is of any culpable attempt; not that intent supplants dangerous probability of success.[11] Justice Holmes had earlier explained the rule in his opinion for the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Peaslee,* 177 Mass. 267, 272, 59 N.E. 55, 56 (1901):

> That an overt act although coupled with an intent to commit the crime commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor * * *.

And, in his subsequent opinion dissenting on other grounds in *Hyde* v. *United States,* 225 U.S. 347, 387-388 (1912), Justice Holmes recapitulated the *Swift* formulation in a way that lays to rest the contention that *Swift* can be read to eliminate the need to prove dangerous probability (emphasis added):

> But combination, intention and overt act may all be present without amounting to a criminal attempt — as

[11]The Court stated in *Swift,* 196 U.S. at 402, that determining whether an act "done with intent to produce an unlawful result is unlawful * * * is a question of proximity and degree." Thus, the holding of *Swift* is that the proper inquiry in an attempted monopolization case involves intent *plus* the proximity of the challenged conduct to the harm — monopolization — that Section 2 is designed to prevent.

> if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. *There must be dangerous proximity to success.*

3. In its original form, the *Lessig* rule would in particular cases do away with the need to define a relevant market or to prove a dangerous probability of actual monopolization. But, as the panel in this case concluded (Pet. App. A11), "the sweeping language of *Lessig*" has been narrowed by subsequent Ninth Circuit decisions, and that court does "require a showing of a relevant market in circumstances where the conduct of the attempted monopolizer is ambiguous or not clearly predatory." The court (*id.* at A11-A12) found "[t]he current statement of the *Lessig* doctrine" in *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979):

> [I]n the absence of proof of relevant market and market power, the plaintiff must prove either predatory conduct or a *per se* violation of § 1 to prove an attempt to monopolize.

The court of appeals in *Gough* recognized that a plaintiff must prove three elements of attempted monopolization (585 F.2d at 390):

> (1) specific intent to control prices or destroy competition with respect to a part of commerce, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success.

But the court added that, in the Ninth Circuit, a "short cut" based on *Lessig* is available to plaintiffs (*ibid.*):

> proof of probability of success can be supplied by inference drawn from proof of specific intent and * * * proof of specific intent can in turn be supplied by

> inference drawn from proof of predatory or anticompetitive conduct which constitutes an unreasonable restraint of trade. [12]

The effect of this Ninth Circuit "short cut" is to eliminate the element of dangerous probability of actual monopolization and, thus, to eliminate the congressionally-mandated distinction between unilateral conduct and concerted action (see pages 4-6, *supra*).[13] That approach is plainly inconsistent with this Court's analysis in *Copperweld* (see pages 5-6, *supra*).

4. Despite the inconsistency of the Ninth Circuit's *Lessig* doctrine with the holdings of this Court and of other courts of appeals, we do not believe that this case is an appropriate vehicle for further review. The case was not tried in the district court under the *Lessig* rule, and the jury's relevant market finding was upheld by the court of appeals. Moreover, although *Lessig* and its progeny are an unfortunate source of confusion in the Ninth Circuit, we see no

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[12]It is not clear from the Ninth Circuit's decisions what constitutes "predatory conduct," but *Gough* (585 F.2d at 390) strongly suggests that any "unreasonable restraint of trade" imposed by a single firm would be sufficient to eliminate the requirement that dangerous probability be proved.

[13]The short-cut is not based on any assumption that particular types of conduct are so likely to lead to monopoly that it is unnecessary to prove dangerous probability in each case. To the contrary, the Ninth Circuit's stated purpose is to apply Section 2 to impose liability on unilateral anticompetitive conduct by firms that are " 'not dangerously close to monopoly power.' " 585 F.2d at 390 n.13, quoting *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 504 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978). See also, *e.g.*, *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1029 (9th Cir. 1981)) (as amended), cert. denied, 459 U.S. 825 (1982) ("the dangerous probability of success requirement is not designed as a means of screening out cases of minimal concern to antitrust policy but is instead a way of gauging more accurately the purpose of a defendant's actions").

sufficient basis in this case for departure by this Court from its usual practice of not considering cases in which an alternative ground adequately supports the judgment below.

a. The jury's verdict was not based on a *Lessig* theory that dangerous probability of successful monopolization may be inferred merely from intent or particular conduct. The jury was instructed (Br. in Opp. App. a2) that:

> An attempt to monopolize has three elements: (1) specific intent to monopolize; (2) some act or acts done in furtherance of an intent to monopolize; and (3) which although insufficient to actually produce monopoly power creates a dangerous probability that the defendant will achieve a monopoly of the relevant market.

The jury also was given a detailed instruction regarding relevant market and its relationship to monopoly power (*id.* at a1-a2). At Mobil's request, the jury was further instructed that Mobil's "natural monopoly over [its] own products" was not in itself an antitrust violation.[14]

Petitioner's objections to the monopolization and attempted monopolization instructions did not include a specific request for any additional instructions on relevant market or attempted monopolization.[15] Moreover, the

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[14]Instruction No. 31, as given to the jury, stated:

> A manufacturer has a natural monopoly over his own products, especially when these products bear the manufacturer's trademark, and, standing alone, that is not an antitrust violation. You are instructed that unless you find that Mobil used its natural monopoly in its own products to gain monopoly control of the market in which its products compete, it is not an antitrust violation.

[15]In addition to objecting to all instructions on the ground that a directed verdict should be entered in its favor, Mobil objected to the monopolization and attempted monopolization instructions on essentially three grounds: (i) that the instructions were "unnecessary and misleading"; (ii) that "a manufacturer has a natural monopoly over its own products, and there is no violation of law unless defendant uses such natural monopoly to gain monopoly control of the overall market in which its products compete"; and (iii) that submarket analysis applies only in cases arising under Section 7 of the Clayton Act rather than Section 2 of the Sherman Act (Objections to Court's Instructions at 3).

The first objection is too vague to satisfy the requirements of Fed. R. Civ. P. 51. The second is, in effect, a request for an instruction (No. 31) that was given (see note 14, *supra*). The third fails to recognize that in cases arising under Section 7 of the Clayton Act, as well as in those arising under Section 2 of the Sherman Act, the relevant market is generally the smallest market within which market power may be exercised, although other, broader markets may exist. See *Merger Guidelines, supra,* § 2.11, at 4; *United States* v. *Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981). In any event, Mobil did not object to the court's failure to give additional instructions on market definition or attempt to monopolize.

substance of the instructions was a proper statement of the relevant law. Although respondents had requested an instruction based on *Lessig*, stating that specific intent could be inferred from per se violations of the Sherman Act, no such instruction was given.

The jury must be presumed to have followed the instructions that were given by the court. *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981). And it was on the basis of these instructions that the jury found that Mobil had attempted to monopolize the market or submarket "for the sale of Mobil-branded and non-Mobil-branded oil, lubricants, and TBA&S to Mobil dealers" (Pet. App. A10). Accordingly, the attempted monopolization verdict was based on findings of dangerous probability of monopolization in a relevant market. And, the court of appeals specifically ruled that on appeal Mobil had "pointed to nothing in the record that would lead [the court] to question the jury's factual finding" (*id.* at A11). The Ninth Circuit's *Lessig* discussion therefore was not necessary to its affirmance of the jury's verdict.

b. Mobil's petition for a writ of certiorari fails to show that the decision below rests on the *Lessig* doctrine. Mobil does not specifically challenge the jury instructions nor does it explicitly attack the sufficiency of the evidence to support the jury's relevant market finding. Rather, Mobil asserts (Pet. i, 9) that the decision below must rest on the *Lessig* holding because the relevant market found by the jury is "a market which cannot constitute a relevant market under the federal U.S. antitrust laws." Petitioner also argues (*id.* at 11) that there was legal error below in that "the relevant market must be defined to include sales of all interchangeable products to similarly situated dealers with whom the Mobil dealers compete."

Mobil's argument is essentially that non-Mobil dealers sell products that retail consumers consider interchangeable with Mobil's and that within a given geographic area these dealers are necessarily part of any relevant market that includes the Mobil dealers (see Pet. 10-11). In support of this assertion, Mobil cites cases (Pet. 6-7; Reply Br. 3 n.2) holding that, on the facts before those courts, the relevant market was not shown to be limited to the products of a single company.[16] Those cases are not controlling here, however. As the court of appeals in this case recognized, market definition is an issue of fact.[17] While the factors

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[16]The market found by the jury in this case was not limited to sales of Mobil-branded products, nor, as Mobil suggests in its petition (Pet. 10), was the market restricted to sales by Mobil. See Pet. App. A10 n.4.

[17]See, *e.g.*, *International Boxing Club* v. *United States*, 358 U.S. 242, 251 (1959) (district court's finding of relevant market must be upheld because it was not "clearly erroneous"); *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 915 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975) ("plain error" in lower court's market definition); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978) (court reviewed evidence to determine whether it was sufficient to support jury's verdict); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F.2d 72, 82 n.18 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978) (relevant market is a question of fact for the jury).

considered in other cases are relevant in determining whether a court has applied the correct legal standard in making findings in a non-jury case or in instructing a jury, a factual finding based on a particular record is not controlling in a different case involving different parties.

The jury in this case found a market, consisting of sales of Mobil-branded and non-Mobil-branded TBA&S to Mobil dealers. Such a market may be unusual, but it is not inconceivable, nor is its existence precluded by any other finding made by the jury.[18] The court of appeals held that the record supported the jury's relevant market finding, and this Court

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[18]Mobil appears to argue that the market found by the jury cannot constitute a relevant market because, as far as the ultimate consumers are concerned, Mobil's products are functionally interchangeable with products of other companies. Functional similarities or differences in products are a factor in defining the relevant market. *Merger Guidelines, supra*, § 2.12; *United States* v. *duPont & Co.*, 351 U.S. at 393-404. But there are other factors that determine "how far buyers will go to substitute one commodity for another." *United States* v. *duPont & Co.*, 351 U.S. at 393. See *Merger Guidelines, supra*, § 2.21. Thus even products that are functionally interchangeable from an objective standpoint may not be in the same market. For example, customers may perceive sufficient differences that they will not substitute one for the other in the face of a small but significant increase in price, or the products may be purchased as part of different packages of goods and services for which the cost of those products is a relatively insignificant part of the total cost.

For these or other reasons, Mobil dealers might have been able to pay more for TBA&S than were other dealers who bought "functionally similar" products. Thus, the relevant market could have been limited to TBA&S sales to Mobil dealers if, for example, those dealers were subjected to price discrimination. Sellers engage in price discrimination in an economic sense if they sell at two different prices to two groups of customers as to whom the sellers' costs are equal. Where price discrimination is possible, a seller can profitably impose a "small but significant and nontransitory" increase in the price of its products to a group of buyers who cannot easily substitute, while selling at a lower price to another group of buyers who are more price-sensitive. In such situations, it is appropriate to view each of the two groups of buyers as a

customarily defers to the courts of appeals on such evidentiary issues rather than undertaking its own examination of the record.[19]

c. This case does not appear to be one in which the Court should depart from its normal practice and consider an issue that would not affect the outcome of the case. The *Lessig* doctrine is obviously erroneous, but there appears to be little risk that any of the other courts of appeals will follow the Ninth Circuit's approach in attempted monopolization cases. Indeed, most other circuits expressly have declined to follow *Lessig* and its progeny.[20] Moreover, even within the Ninth Circuit the continuing impact of *Lessig* is difficult to ascertain. That court rarely relies on *Lessig* as the sole ground for decision in Section 2 attempt cases. Most plaintiffs who prevail on Section 2 claims apparently

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separate market. See generally, *Merger Guildelines, supra*, §§ 2.13, 2.33.

We express no view on whether the evidence in this case was sufficient to prove a relevant market limited to sales of TBA&S to Mobil dealers; our point is simply that the possibility of such a market cannot be rejected as a matter of law as petitioner contends.

[19]This Court has "frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

[20]See, *e.g.*, *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 711-712 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d at 276 & n.69; *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977); *E.J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d at 305; *George R. Whitten, Jr., Inc.* v. *Paddock*, 508 F.2d at 550; *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269, 287 (8th Cir.), cert. denied, 414 U.S. 1022 (1973).

do prove relevant market and dangerous probability;[21] the *Lessig* doctrine endures primarily as an alternative ground for decision. According to petitioner (Pet. 7), this is the first case in which a final judgment awarding treble damages for attempted monopolization has been sustained solely on the basis of *Lessig*. And, as we have shown (see pages 12-13, *supra*), there is an alternative ground even in this case.

This is not to deny that *Lessig* may continue to have serious adverse effects. It may, for example, make it more difficult to dispose of meritless claims by summary judgment, and it may permit district courts in the Ninth Circuit to be less rigorous in assessing the sufficiency of plaintiffs' evidence of relevant market. The presence of alternative grounds in cases purporting to apply *Lessig*, however, tends to undercut petitioner's argument that *Lessig* presents a serious threat of unwarranted treble damage liability.

Despite apparent intracircuit conflicts,[22] and the conflict between the *Lessig* doctrine and decisions of other courts of appeals, the Ninth Circuit has not yet sat *en banc* to review a case involving the *Lessig* doctrine. This may be due in part to the presence of alternative grounds in those panel decisions in which *Lessig* has been cited. Should a case arise in which the *Lessig* doctrine is dispositive, the Ninth Circuit may have an opportunity to resolve the existing conflict. In doing so, it will have the benefit of this Court's opinion in *Copperweld*, which provides an extensive explanation of

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[21]Because of the uncertainty in the application of *Lessig*, a prudent Ninth Circuit plaintiff will attempt to prove relevant market and dangerous probability. Those who are unable to do so have apparently also been unable in most cases to prove the other elements of a Section 2 violation.

[22]As petitioner correctly notes (Pet. 19-21), some Ninth Circuit panels appear to overlook the rule, others appear to require — or at least note the presence of — a showing of dangerous probability and relevant market, still others feel bound to follow *Lessig* although expressing doubts about it.

the Sherman Act's distinction between unilateral and concerted action.[23] Until the Ninth Circuit has resolved its intracircuit conflicts — or at least until it has declined to rehear *en banc* a case that squarely presents the *Lessig* issue — it appears unnecessary for this Court to review a case in which that doctrine provides only an alternative ground for the judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[23] The court of appeals denied Mobil's petition for rehearing en banc on February 21, 1984 — four months before this Court decided *Copperweld*.

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No. 83-1896

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,
vs.
JERRY A. BLANTON, ROY H. HEALEY,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF AND RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONER'S SUPPLEMENTAL BRIEF AND RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

I

INTRODUCTION

Barely eight months ago, this Court directed that state law business torts cannot masquerade as federal antitrust claims. *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984). It is difficult to imagine a decision which violates the *Copperweld* mandate more than the Ninth Circuit's decision here. Following its own precedent of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.) *cert. denied*, 377 U.S. 993 (1964) — a decision contrary to the law of this court and every other circuit — the Ninth

Circuit has held Petitioner Mobil Oil Corporation liable for *attempting* to monopolize where, if successful, Mobil could not be held liable for *actual* monopoly. Thus, the masquerade is evident: Mobil will suffer treble damages for no possible antitrust attempted monopoly.

The United States, as *amicus curiae*, agrees that the anomalous Ninth Circuit *Lessig* rule is "obviously erroneous." Amicus Brief at 16. In nevertheless suggesting that this Court deny *certiorari*, the United States misconstrues the Ninth Circuit's decision. No alternative ground to *Lessig* supports the Ninth Circuit's ruling. The Ninth Circuit did *not*, as intimated by the United States, uphold the relevant market finding of the jury; instead that court declined to rule on whether the submarket was one which had economic reality — as every relevant submarket must — because "it is clear that the jury's attempted monopolization finding may be sustained under *Lessig* ..." (Pet., App. A-11.). The United States ignores the plain words of the Ninth Circuit: that it affirmed *only* on the basis of *Lessig*.

Moreover, the United States is all too sanguine that the Ninth Circuit itself will reform the *Lessig* doctrine. It did not do so in this case. Nor will the *Copperweld* decision bind the Ninth Circuit to do so; indeed, denial of *certiorari* will convey the clear message that, despite *Copperweld*, *Lessig* retains its vitality.

II

WITHOUT REVIEW AND REMAND OR REVERSAL, THE LESSIG RULE WILL CONTINUE TO PLAGUE NINTH CIRCUIT LITIGANTS

A. The Obvious Error of Lessig

Before addressing those points on which the United States parts company with Mobil, it is instructive to survey those substantial points with which the Government agrees:

• The United States concedes, in its brief as *Amicus Curiae*, that the Ninth Circuit's anomalous *Lessig* doctrine misapplies the decisions of this Court which require an antitrust plaintiff to demonstrate a dangerous probability of successful monopolization of a relevant market in order to establish attempt to monopolize. *Amicus* Brief, pp. 7-8.

• The United States agrees with Mobil that the *Lessig* rule is in effect merely a Ninth Circuit attempt to create a general business tort "masquerading" as an antitrust claim, but which in fact is designed to punish unilateral business conduct without reference to its impact upon competition. *Amicus* Brief, pp. 5-6.

• The United States correctly notes that there is no "economic justification" for *Lessig's* abolition of the dangerous probability requirement. *Amicus* Brief, p. 7.

• The United States observes the Ninth Circuit's isolation from all other circuits and the confusion the *Lessig* rule engenders even among different Ninth Circuit panels. *Amicus* Brief, pp. 3-5, 17 n.22.

• The United States recognizes that *Lessig* may continue to cause serious adverse effects. *Amicus* Brief, pp. 17.

B. Certiorari Should be Granted Despite the Government's Attempts to Minimize Lessig

In the face of its recognition that *Lessig* is "obviously erroneous," the United States suggests *certiorari* denial for unusual reasons. In part, the United States argues that there is little danger of the *Lessig* disease spreading, because other circuits seem to be immune. *Amicus* Brief, p. 16. But this does not remove the injustice of an anomalous rule which unfairly burdens Ninth Circuit litigants with unnecessary and economically unjustified federal antitrust suits. The purpose of *certiorari* is to restore harmony among the circuits and ensure that the lower courts act consistently with this court. The Government in effect

advocates that the disharmony it acknowledges here should be continued rather than corrected.

The Government also argues that *Lessig* need not be confronted because it is seldom the only theory upon which a plaintiff proceeds. This, however, does not diminish the possibility of confusion: it increases it. The mischief of *Lessig* is to take a simple case — e.g., of tying, for which damages are easily assessed — and create artificial complexity, thereby allowing liability for attempted monopoly where it would not otherwise exist. Among other things, this tactic wrongly increases awards, as it did here.

Finally the Government's speculation that some day the Ninth Circuit may meet *en banc* to destroy its troublesome brainchild (*Amicus* Brief, pp. 17-18) is naive; the Ninth Circuit consistently has refused to do so for *twenty* years, including refusing to do so here. Indeed, this Court recently rejected the Government's overly optimistic view of another questionable Ninth Circuit antitrust rule when it granted *certiorari* in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* (No. 83-1368). Mobil respectfully submits a similar course is appropriate here.

C. This Case Clearly and Directly Presents the Lessig Issue for Review

Notwithstanding its condemnation of *Lessig*, the United States declines to recommend review in this case because it believes an alternative basis of decision was suggested by the Ninth Circuit's statements that "a jury's finding of a relevant market cannot be disturbed unless it is clearly erroneous," and that "Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding." Appendix to Petition, A-10, A-11. Contrary to the position of the United States, the Ninth Circuit then went on to expressly ground its decision on *Lessig*, and did *not* uphold the jury's finding. (Pet., App. A-11). The

jury's finding thus went unreviewed precisely *because* of *Lessig* and was not an alternative ground for the Ninth Circuit's decision. Moreover, the jury's finding *could not* have furnished an alternative ground for decision, for the cases recognize that a relevant market must have economic reality — and that this one did not.

A market is relevant if its domination gives the successful monopolist ability to control competition and fix prices. If interchangeable, substitute products exist, monopoly power does not. This is the economic reality of the marketplace. It is the burden of an antitrust plaintiff to prove the relevant market as an element of his case.

Here, as was repeatedly pointed out in Mobil's briefs on appeal, Respondents adduced *no evidence* to show that Mobil's TBA&S and other automotive products were not interchangeable with products manufactured and/or sold by other, competing manufacturers. *See, e.g.*, Mobil's Opening Brief, pp. 5, 15-16. Factually, therefore, this case is indistinguishable from *Lessig*. There too, the Ninth Circuit was confronted with a market defined without regard to competition, monopoly power, or economic reality. Tidewater, even if it had succeeded in "monopolizing" sales of TBA to its dealers, would not have had monopoly power to fix prices because of the competition faced by those dealers from others selling fungible products. To escape this impasse and to punish the unilateral business conduct of defendant, the Ninth Circuit ruled, by fiat, that relevant market was irrelevant in attempt cases. Absent the *Lessig* rule, the same impasse is presented here.

Respondents never claimed that they produced evidence of absence of product interchangeability. Instead, respondents believe that if Mobil treats its dealers as a "captive market," those dealers can constitute a relevant market for antitrust purposes *without any reference to impact upon competition*. Therefore, the only evidence respondents introduced regarding the existence of a submarket was

evidence as to how Mobil viewed or treated its dealers. Mobil asserted to the Ninth Circuit that such a submarket cannot be a relevant market because it fails to account for competing products which prevent Mobil from controlling competition or fixing prices, *i.e.* such a submarket lacks economic reality. The submarket for which respondents contended makes no reference to potential injury to competition, contrary to controlling case law.[1]

In short, respondents produced no evidence of product uniqueness, which they were required to produce as part of their burden. *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835 (5th Cir. 1975) *cert. denied*, 424 U.S. 934 (1976); *L.A. Draper & Son v. Wheelbrator-Frye, Inc.*, 735 F.2d 414 (11th Cir. 1984); *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). It is here that the United States misconstrues the Ninth Circuit's passing reference, that "Mobil pointed to nothing" in the record rebutting respondents' asserted "submarket." Mobil pointed to nothing in the record because there was nothing in the record to point to. *No* evidence of product uniqueness was produced. How Mobil viewed its dealers is irrelevant for the purposes of the federal antitrust laws. What *is* involved in relevant market definition, as *du Pont* and other decisions of this Court make clear, is drawing

[1]The United States makes much of the fact that the jury verdict "was not based on a *Lessig* theory." Amicus Brief, p. 12. Nevertheless the jury verdict was erroneous because it was unsupported by *any* evidence of product uniqueness and this verdict, lacking any foundation in economic reality, was *affirmed* only on the basis of *Lessig*. The United States also erroneously states Mobil "did not object to the court's failure to give additional instructions on market definition or attempt to monopolize." On the contrary, Mobil requested instructions which would have required the jury to consider product interchangeability. For example, Mobil's requested Instruction 98 stated: "The basic idea of a relevant market is that the products within it are interchangeable as a practical matter from the buyer's point of view."

the market to encompass competing products so that monopoly power, if achieved in such a market, could have an impact on competition. The relevant market for this analysis is the market in which the competitors' products compete.

Nor does the contention that a relevant market finding is factual obviate the necessity for a reviewing court to assure itself that such a market has economic reality. As noted by the very authority cited by the Ninth Circuit in the passage singled out by the Government:

> "Although the search for a relevant market is *basically* a factual inquiry, it deserves noting that the District Court also properly followed precedent in this area by restricting the relevant market to *one wherein a commercial reality exists.*"
>
> *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299 (9th Cir.), *cert. denied* 459 U.S. 1009 (1982). (emphasis added).

Such a requirement is deeply ingrained in federal antitrust laws. Indeed, *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962) is premised on this requirement. Attempts to define a relevant submarket in terms which have no economic reality have been rejected by virtually every court which has had occasion to consider the precise issue. For example, in the automotive industry, attempts to limit relevant market to a submarket consisting of the products distributed by one manufacturer have consistently failed.[2] Citing *Packard Motor Car Co. v. Webster Motor*

[2]The Government, without distinguishing these automotive products cases, argues they rely on "factual" determinations, and thus, establish no legal limits to what may or may not constitute a relevant market. We note first that the *absence* of interchangeability evidence was the basis for many of these cases, as it was also for Mobil's appeal. Second, these cases stand for the obvious proposition that there must be some rational *limit* to the jury's discretion.

Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), and *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F.Supp. 453 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3d Cir. 1969), the court in *Mogul v. General Motors Corp.*, 391 F.Supp. 1305, 1313 (E.D. Pa. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976), rejected the plaintiff's contentions that Cadillac could be used as a relevant product market by itself, stating:

> "In the instant case, I may, and do, take judicial notice that the relevant product market cannot be limited to Cadillac. The Cadillac is interchangeable with other luxury automobiles on the market which serve the same purpose and, in addition, it competes with even the less expensive models of automobiles in serving the consuming public's transportation needs and desires. Cadillac division of G.M.C. has neither the power to fix prices, nor the power to exclude competition from manufacturers of other luxury automobiles or of all other types of automobiles in the relevant market." 391 F.Supp. at 1313.

Of course, the ability to exclude competition and fix prices referred to in this court's opinion is the market power definition enunciated by this Court in *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Automotive cases in accord with the *Mogul* decision abound.[3]

The proper analysis is the same in the petroleum industry. In *Mullis v. ARCO Petroleum Co.*, 502 F.2d 290

[3] *See, e.g., Packard Motor Co. v. Webster Motor Car Co., supra; Mount Lebanon Motors Inc., Co. v. Chrysler Corp., supra; Merit Motors, Inc. v. Chrysler*, 417 F.Supp. 263 (D.D.C. 1976), *aff'd*, 569 F.2d 666 (D.C. Cir. 1977); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F.Supp. 110 (E.D.N.Y. 1976); *McDaniel v. General Motors Corp.*, 480 F.Supp. 666 (E.D.N.Y. 1979), *aff'd*, 628 F.2d 1345 (2d Cir. 1980); *Kemwel Automotive Corp. v. Ford Motor Co.*, 1966 Trade Cases ¶71-882 (S.D.N.Y. 1966).

(7th Cir. 1974), the Seventh Circuit reversed a district court injunction enjoining defendant from refusing to furnish petroleum products to the plaintiff distributor. Rejecting the plaintiff's contention that the relevant market was limited to petroleum products distributed by ARCO, the court noted:

> "That assumption is not supported by the evidence but is, in fact, contradicted by it. Plaintiff offered no evidence to prove that there are any legal or economic barriers to competition from areas immediately adjacent to Lawrence County. *More significantly, there is no proof that ARCO products are in a way different from other brands of petroleum products available in Lawrence County.* Even if we were to assume, without proof, that ARCO's gasoline or fuel oil is not a standardized commodity, either because of physical characteristics of the product or because advertising has enhanced its consumer acceptance, there is no evidence indicating the extent of its differentiation from other brands or the competitive significance of any such possible differentiation. The only relevant evidence in the record proves that ARCO products are in active competition with other brands. Under the kind of economic analysis employed by both the majority and dissent in *United States v. E. I. du Pont de Nemours*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed 1264, plaintiff clearly failed to prove that sales of ARCO petroleum products in Lawrence County, Indiana, constitutes a relevant market." 502 F.2d at 296 (footnotes omitted) (emphasis added).

In contrast to these authorities, the submarket identified by respondents could characterize a completely legal distribution system. A hypothetical situation illustrates this fact. If all aspects of the manufacturer-dealer relationship were identical to those argued by respondents

herein, but there was only one Mobil dealer in the entire Seattle area, under respondents' analysis, the same result must apply: that single dealer constitutes a relevant submarket which could be illegally monopolized. Yet under the authorities the sales to a lone dealer certainly could *not* constitute a relevant market where the dealer's ability to raise his prices is completely circumscribed by competition. Domination of sales to that dealer would have no impact whatever upon competition — which it is the goal of federal antitrust laws to protect.

The relevant market contended for by respondents was thus, as a matter of law, no relevant market at all. Had the Ninth Circuit affirmed on that basis, it would have been clear error, because no evidence of product interchangeability was produced to support the existence of such a market. Instead, however, the Ninth Circuit affirmed on the basis of *Lessig*, and *Lessig* alone — thereby presenting the *Lessig* issue squarely for review by this Court.

III

CONCLUSION

Certiorari should be granted.

Dated: March 4, 1985.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

MOBIL OIL CORPORATION *v.* JERRY A. BLANTON AND ROY H. HEALEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–1896. Decided April 1, 1985

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit affirmed a jury verdict that petitioner had attempted to monopolize in violation of § 2 of the Sherman Act, 15 U. S. C. § 2, and was therefore liable to respondent for treble damages. Ordinarily, a finding of attempted monopolization depends on a showing that there was a dangerous probability that the defendant would succeed in monopolizing a relevant market. See *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965); *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F. 2d 263, 271–275 (CA2 1979), cert. denied, 444 U. S. 1093 (1980). In this case, the jury found that the relevant submarket that petitioner had attempted to monopolize consisted of sales of "Mobil-branded and non-Mobil-branded oil, lubricants, and [tires, batteries, accessories and specialties] to Mobil dealers."

On appeal, petitioner contended that, as a matter of law, sales to Mobil dealers only could not constitute a relevant submarket. The Court of Appeals found it unnecessary to address this contention, for it concluded that the finding of attempted monopolization could be sustained without reference to the effects of petitioner's conduct in any relevant market. The court relied in part on the Ninth Circuit's earlier ruling in *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459, cert. denied, 377 U. S. 993 (1964), in which the court had held that the relevant market was not an issue in an attempted

monopoly case. In subsequent cases, the Ninth Circuit had refined the holding of *Lessig* to allow avoidance of the issue of effects in a relevant market only in cases where the plaintiff had proved "either predatory conduct or a *per se* violation of § 1 [of the Sherman Act, 15 U. S. C. § 1]." *Gough* v. *Rossmoor Corp.*, 585 F. 2d 381, 390 (CA9 1978), cert. denied, 440 U. S. 936 (1979). Relying on the "*Lessig* doctrine" as modified in *Gough*, the court held that because respondent had proved that petitioner had engaged in practices that constitute per se violations of § 1 of the Sherman Act, the attempted monopolization verdict could be sustained without reference to the probability that petitioner's conduct would lead to monopolization of any relevant market.

Sections 1 and 2 of the Sherman Act are directed to different sorts of threats to competition in our economy. Section 1 proscribes concerted action—contracts, combinations, and conspiracies in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Copperweld Corp.* v. *Independence Tube Corp.*, —— U. S. —— (1984).

Because the *Lessig* doctrine allows a violation of § 2 to be found on the basis of a per se violation of § 1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles. In addition, the doctrine, although accepted within the Ninth Circuit for over twenty years, has been explicitly rejected by a number of Courts of Appeals outside the Ninth Circuit. See *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105, 117 (CA3 1980), cert. denied, 451 U. S. 911 (1981); *Photovest*

Corp. v. *Fotomat Corp.*, 606 F. 2d 704, 711–712 (CA7 1979), cert. denied, 445 U. S. 917 (1980); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F. 2d 256, 276 and n. 69 (CA5 1978), cert. denied, 440 U. S. 939 (1979); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F. 2d 1019, 1030 (CA2 1976), cert. denied, 429 U. S. 1097 (1977); *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F. 2d 296, 305 (CA10 1975), cert. denied, 425 U. S. 907 (1976); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 550 (CA1 1974), cert. denied, 421 U. S. 1004 (1975); *Agrashell, Inc.* v. *Hammons Products Co.* 479 F. 2d 269, 287 (CA8), cert. denied, 414 U. S. 1022 (1973). The questionable validity of the doctrine on which the decision of the Ninth Circuit in this case rested and the longstanding conflict among the Circuits over the issue indicate that this case is one that this Court ought to resolve. I would therefore grant the petition for certiorari.